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Voir Dire in Kentucky: An Empirical Study of Voir Dire in Kentucky Circuit Courts

BY WILLIAM H. FORTUNE*

INTRODUCTION

Voir dire¹ is the stage of a jury trial at which prospective jurors are questioned under oath by court or counsel to determine their suitability as jurors in the case to be tried. Kentucky's high court has repeatedly recognized the importance of voir dire² to the exercise of for-cause and peremptory challenges.³

The trial judge's wide discretion in voir dire, however, necessarily makes a review of appellate decisions of minimal assistance in ascertaining what actually occurs during this important phase of a jury trial. Published opinions provide little guidance in this area; information about voir dire must come from a study of the trial process.

Therefore, in order to gain a perspective on Kentucky voir dire practices, the author conducted a comprehensive survey of Kentucky circuit court judges. This survey involved a

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¹ Voir dire literally means "to say truly."

² The Kentucky Court of Appeals' recognition of voir dire examination as a means to challenge biased jurors was noted in *Temperly v. Sarrington's Adm'r*, 293 S.W.2d 863 (Ky. 1956), where the court stated that "counsel should be given a fair opportunity to question the jurors on voir dire to discover whether or not any of the prospective jurors have bias or prejudice in the case to be tried." *Id.* at 868.

Similarly, the Kentucky Court has recognized the relationship between voir dire and peremptory challenges. In *Lightfoot v. Commonwealth*, 219 S.W.2d 984 (Ky. 1949), the Court said: "[A] litigant is entitled to make inquiry of jurors in respect to any matter which will throw light on the background of the juror in order that the litigant may better exercise his discretion in respect to peremptory challenges. *Id.* at 989.

³ A challenge for cause is a challenge for implied or actual bias. A peremptory challenge is a challenge for which no reason need be assigned.

written questionnaire that was sent to all circuit judges, eighty percent of whom completed it, and follow-up interviews with fifteen randomly-selected judges. This article analyzes the results of the study and recommends standards to guide the discretion of trial judges.

I. THE ORIGINS OF VOIR DIRE

At common law, both voir dire examination and the exercise of challenges were severely limited. Peremptory challenges were provided in felony cases,⁴ although not in civil or misdemeanor cases,⁵ while challenges for cause were provided in all cases.⁶ Questioning of jurors prior to the exercise of challenges, however, was not permitted;⁷ such interrogation was allowed only *after* challenge, and then only if the questioning would not dishonor or discredit the juror.⁸ In eighteenth century England voir dire was rare, and the exercise of challenges was based, of necessity, on personal knowledge, pre-trial investigation and first impressions.⁹ These practices have persisted in England, with voir dire non-existent and challenges rare.¹⁰ By contrast, in this country voir dire and challenges are considered essential to a fair trial. Evidence in-

⁴ At early common law the accused was given 35 peremptory challenges, while the Crown was provided an unlimited amount. By the eighteenth century the defendant's peremptory challenges were limited to 20, while the Crown was given none. 5 M. BACON, A NEW ABRIDGEMENT OF THE LAW 362-65 (1844); Moore, *Voir Dire Examination of Jurors—Part I. The English Practice*, 16 GEO. L.J. 438, 447 (1928).

⁵ Moore, *supra* note 4, at 448.

⁶ Such challenges, known as "*challenges to the polls*," were proper when the juror was incompetent because he owned insufficient property, because he was an alien or a minor, or because he had been convicted of an infamous offense. Such challenges were also proper when the circumstances warranted suspicion of bias. Such bias could be either actual or implied by law because of the relationship between the juror and the party or cause. *Id.* at 440-41.

⁷ P. DEVLIN, TRIAL BY JURY 28-29 (1956); R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 289-91 (1952).

⁸ Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290, 292-93 (1972).

⁹ Moore, *supra* note 4, at 445.

¹⁰ P. DEVLIN, *supra* note 7, at 29-30. "What strikes most forcibly the American Lawyer who attends an English jury trial is the absence of any preliminary examination of the prospective jurors, for the purpose of ascertaining whether or not there is ground for challenge. . . ." R. MILLAR, *supra* note 7, at 289.

dicates that the drafters of the Constitution and Bill of Rights intended the terms "trial by jury" in article III and "impartial tribunal" in the sixth amendment to include the right of challenge in felony cases.¹¹ In 1807 Chief Justice John Marshall, presiding over the treason trial of Aaron Burr, ruled that questioning of jurors prior to challenge to discover prejudice was proper.¹² Partly as a result of this notorious case, preliminary questioning of jurors prior to challenge was a generally accepted right of parties¹³ by the early nineteenth century.

II. THE HISTORY OF VOIR DIRE IN KENTUCKY

A. Challenges

In December 1796, the Kentucky General Assembly enacted rudimentary criminal and civil codes.¹⁴ The civil code did not provide peremptory challenges; the criminal code accorded those accused of felonies twenty peremptory challenges¹⁵ but granted no reciprocal right to the Commonwealth. The codes were silent on voir dire and challenges for cause, but early cases indicate that Kentucky courts recognized challenges for both actual¹⁶ and implied¹⁷ bias.

In 1798 the General Assembly granted peremptory challenges to those accused of misdemeanors¹⁸ and in 1806 gave

¹¹ Gutman, *supra* note 8, at 296-99.

¹² R. MILLAR, *supra* note 7, at 292-93; Gutman, *supra* note 8, at 305-07.

¹³ R. MILLAR, *supra* note 7, at 292; Gutman, *supra* note 8, at 307.

¹⁴ Act of Dec. 17, 1796, BRADFORD'S LAWS OF KENTUCKY 192-206 (1799); Act of Dec. 19, 1796, BRADFORD'S LAWS OF KENTUCKY 216-29 (1799). Section 56 of the Dec. 17, 1796 Act (criminal code) and § 32 of the Dec. 19, 1796 Act (civil code), both state: "Jurors knowing anything relative to the point in issue shall disclose the same in open court." These provisions probably were intended to insure that jurors were competent witnesses rather than to give the parties a right to inquire into the jurors' knowledge of the facts.

¹⁵ Act of Dec. 17, 1796, § 19, BRADFORD'S LAWS OF KENTUCKY 195 (1799).

¹⁶ *Pierce v. Bush*, 6 Ky. (3 Bibb) 347 (1814) (Court of Appeals ordered a new trial where the juror declared that his mind was settled against the defendant prior to the trial).

¹⁷ *Dailey v. Gaines*, 31 Ky. (1 Dana) 529 (1833) (new trial ordered where juror was the plaintiff's uncle by marriage); *Herndon v. Bradshaw*, 7 Ky. (4 Bibb) 45 (1815) (new trial ordered where juror had sat on previous trial of case).

¹⁸ Act of Dec. 22, 1798, 1 MOREHEAD & BROWN'S COMPILATION OF KENTUCKY LAWS 533 (1834).

civil litigants the right to challenge peremptorily one-fourth of the jury summoned.¹⁹ The Commonwealth was not granted peremptory challenges in criminal cases until 1854. In that year the legislature enacted a comprehensive criminal practice code that provided five peremptories for the Commonwealth and twenty for the defendant in felony cases; in misdemeanor cases, each side was granted three peremptory challenges.²⁰

B. *Voir Dire*

Litigants in Kentucky courts in the early nineteenth century almost certainly had the right to voir dire jurors to discover actual and implied bias; these concepts of bias were in fact codified in the Criminal Code of 1854.²¹ In 1825 the Gen-

¹⁹ Act of Dec. 27, 1806, § 1, 2 MOREHEAD & BROWN'S COMPILATION OF KENTUCKY LAWS 884 (1834).

²⁰ CRIM. CODE OF PRACTICE, §§ 204 & 205 (Myers ed. 1867). *Walston v. Commonwealth*, 55 Ky. (16 B. Mon.) 13 (1855) held that the provision in the 1854 code granting peremptory challenges to the Commonwealth was not an ex post facto law. This holding clearly implies that the Commonwealth had no such right prior to 1854.

²¹ CRIM. CODE OF PRACTICE, §§ 210 & 211 (1854) provided:

Sec. 210. *Actual bias defined.* Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case or to either party, as satisfies the court, in the exercise of a sound discretion, that he can not try the case impartially and without prejudice to the substantial rights of the party challenging.

211. *What constitutes implied bias.* A challenge for implied bias may be taken, 1. Where the juror is related by consanguinity, or affinity, or stands in relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or is a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instigated.

2. Being adverse to the defendant in a civil suit, or having complained against, or been accused by him, in a criminal prosecution.

3. Having served on the grand jury which found the indictment, or on the coroner's jury which inquired into the death of the party, whose death is the subject to the indictment.

4. Having served on a trial jury, which has tried another person for the offense charged in the indictment.

5. Having been one of a former jury sworn to try the same indictment, and whose verdict was set aside, or who were discharged without a verdict.

6. Having served as a juror in a civil action brought against the defendant for the act charged in the indictment.

7. When the offense is punishable with death, the entertaining of such conscientious opinion as would preclude him from finding the defendant guilty.

With only a slight modification in 1888, these provisions were in effect until the adop-

eral Assembly provided that "the Commonwealth shall have the same right to interrogate a venireman . . . relative to his qualifications, as the prisoner now has,"²² the implication being that the "prisoner" enjoyed the right of voir dire before 1825. An 1827 statute required judges to disqualify prejudiced jurors,²³ implying that interrogation to discover prejudice was a common practice.

C. Attorney Questioning

By the latter half of the nineteenth century, litigants clearly had assumed the right to interrogate prospective jurors prior to exercising their challenges for cause and peremptory challenges.²⁴ An 1890 case demonstrates that attorneys, not judges, generally did the questioning. In *London and Lancashire Fire Insurance Co. v. Rufer's Adm'r*,²⁵ the trial judge had conducted the voir dire and had denied counsel the opportunity to ask questions. The Court of Appeals affirmed the judgment because counsel could not point to any specific prejudice; however, the Court said the trial judge should have permitted questioning by counsel.²⁶ Thus, the standard voir dire at the turn of the century was one in which attorneys did most of the questioning.

tion of the Rules of Criminal Procedure in 1962.

²² Act of Jan. 12, 1825, § 6, 1 MOREHEAD & BROWN'S COMPILATION OF KENTUCKY LAWS 543 (1834).

²³ Act of Jan. 22, 1827, 2 MOREHEAD & BROWN'S COMPILATION OF KENTUCKY LAWS 885 (1834).

²⁴ *Apkins v. Commonwealth*, 147 S.W. 376 (Ky. 1912). *Apkins* construed § 213 of the Criminal Code of 1854 as granting the accused the right to question the jurors individually. The Court clearly misconstrued that section, for it provided only that a juror may be examined under oath by either party upon challenge. The 1854 Act had been passed as a result of an identical English act designed to codify the restrictive English practice of questioning after the challenge. R. MILLAR, *supra* note 8, at 290. Despite the misconstruction of § 213, *Apkins* remained the law until the passage of the Rules of Criminal Procedure in 1962. See *Woodford v. Commonwealth*, 376 S.W.2d 526 (Ky. 1964).

²⁵ 89 Ky. 525 (1890).

²⁶ *Id.* at 527-28.

III. THE RELATIONSHIP BETWEEN VOIR DIRE AND ACTUAL AND IMPLIED BIAS

A. *Actual Bias*

One purpose of voir dire is to discover bias, either actual or implied, that will support a challenge for cause. Actual bias is shown by the juror's statements against the parties or the cause.²⁷ If the judge determines from statements during voir dire or from a previously expressed opinion that a prospective juror will be actually biased, the juror should be excused at the request of the party potentially aggrieved.²⁸ The determination of actual bias is within the inherent discretion of the trial court.²⁹

B. *Implied Bias*

Implied bias, on the other hand, exists whenever the circumstances are such that partiality is implied by law,³⁰ without proof that the juror is in fact biased.³¹ Bias is implied by law to preserve the appearance, as much as the fact, of impartiality.³² Section 211 of the Criminal Code of 1854 codified the grounds of implied bias;³³ the Civil Code did not, leaving the Court of Appeals free in civil cases to say that a particular relationship was or was not one from which bias would be implied.³⁴ Even in criminal cases from 1854 to 1962, the codification in section 211 was not viewed as exclusive, and other circumstances and relationships were deemed to give rise to implied bias.³⁵ Section 211 was repealed with the adoption of

²⁷ Webb v. Commonwealth, 314 S.W.2d 543 (Ky. 1958).

²⁸ Ky. R. Crim. P. 9.36 (1) (1979).

²⁹ Scruggs v. Commonwealth, 566 S.W.2d 405, 410 (Ky. 1978); Polk v. Commonwealth, 574 S.W.2d 335 (Ky. Ct. App. 1978) (no error in trial court's refusal to excuse juror who mistakenly thought defendant previously had robbed his father).

³⁰ Lightfoot v. Commonwealth, 219 S.W.2d 984, 989 (1949).

³¹ 47 AM. JUR. 2D *Jury* § 269 (1969).

³² See, e.g., Hays v. Commonwealth, 458 S.W.2d 3 (Ky. 1970) (trial court committed reversible error in refusing to excuse the sheriff's brother as juror where the sheriff was the prosecutor's witness, despite the juror's claim that he could be impartial).

³³ See note 21 *supra* for the text of § 211.

³⁴ Halleron v. Carrithers Creamery, 239 S.W.2d 92 (Ky. 1951).

³⁵ Tayloe v. Commonwealth, 335 S.W.2d 556 (Ky. 1960); Pennington v. Common-

the criminal rules in 1962, and the present Rule of Criminal Procedure on point merely states: "When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, he shall be excused as not qualified."³⁶ This rule vests discretion in the trial court to imply bias from particular relationships or circumstances,³⁷ subject to review by the appellate court. Standards for the exercise of this discretion can be found in appellate opinions that have focused on particular relationships and circumstances. The civil rules likewise do not define actual or implied bias, nor do they set out grounds for challenge; however, the cases indicate that the treatment in civil cases should be the same as under Rule of Criminal Procedure 9.36.³⁸

The circumstances and relationships which will give rise to implied bias are relatively certain. Section 211 of the Criminal Code listed the following:³⁹

- (1) relationship by consanguinity or affinity to the accused or the victim;
- (2) relationship between the juror and accused or victim of guardian and ward, attorney and client, landlord and tenant, employer and employee;
- (3) whether the juror had been adverse to the defendant in a civil or criminal action;
- (4) whether the juror had served on the coroner's jury which inquired into the cause of death or the grand jury which indicted the defendant;
- (5) whether the juror had served on a jury which had tried another person for the offense;
- (6) whether the juror had been on a former jury which had tried the defendant for the offenses;

wealth, 316 S.W.2d 221 (Ky. 1958) (juror who was the prosecuting witness's first cousin should have been excused, notwithstanding the absence of a provision in § 211).

³⁶ Ky. R. CRIM. P. 9.36 (1) (1979).

³⁷ *Watson v. Commonwealth*, 433 S.W.2d 884 (Ky. 1968).

³⁸ *Commonwealth v. Hall*, 258 S.W.2d 479 (Ky. 1953); *Halleron v. Carrithers Creamery*, 239 S.W.2d 92 (Ky. 1951). The Kentucky Court of Appeals has declared that in civil cases the right to a fair and impartial verdict is fundamental. "It inheres in the woof and warp of the jury system itself. . . ." *Butler v. Commonwealth*, 387 S.W.2d 867, 868 (Ky. 1965).

³⁹ CRIM. CODE OF PRACTICE, § 211 (1854).

(7) whether the juror had served as a juror in a civil action brought against the defendant for the acts charged in the indictment; and

(8) when the offense is punishable with death, whether the juror entertains such conscientious opinions as would preclude the juror from finding the defendant guilty.

Presently, all but the first and last of these statutory grounds will give rise to bias implied at law.⁴⁰ The first ground, relationship by blood or marriage to the accused or victim, would today give rise to implied bias only when the relationship is such that a reasonable inference is that the juror would find it hard to be fair.⁴¹ The trial court undoubtedly has considerable discretion in this matter. The last ground, conscientious opposition to the death penalty, is available only when the juror states that under no set of facts could he vote for the death penalty.⁴² Additionally, the Kentucky courts have held that bias will be implied when a juror is a stockholder of a corporation that is a party⁴³ but not when the juror is a taxpayer of a municipality that is a party.⁴⁴ Whether bias should be implied because of an acquaintance or business relationship is within the discretion of the trial court.⁴⁵

Although the trial court has wide discretion in determining the existence of actual or implied bias, the court clearly must permit *voir dire* on subjects where the juror's answer *might* disclose grounds for challenge for cause. Take the following by way of example. In an automobile accident case, plaintiff's counsel seeks to ask prospective jurors whether any of them has been sued as a result of an auto accident.⁴⁶ The juror's answer might reveal actual bias against those who sue, or might reflect a proximity of time or similarity of events such that the judge would conclude that the juror should not

⁴⁰ See *Commonwealth v. Ginsberg*, 516 S.W.2d 868 (Ky. 1974).

⁴¹ *Halleron v. Carrithers Creamery*, 239 S.W.2d 92 (Ky. 1951).

⁴² *Witherspoon v. Illinois*, 391 U.S. 510 (1968). This case was applied by the Kentucky Court of Appeals in *Fryrear v. Commonwealth*, 471 S.W.2d 321 (Ky. 1971).

⁴³ *Hess Adm'r v. Louisville & N. R.R.*, 61 S.W.2d 299 (Ky. 1933).

⁴⁴ *City of Pikesville v. Riddle*, 230 S.W. 37 (Ky. 1921).

⁴⁵ *Stone v. Commonwealth*, 418 S.W.2d 646 (Ky. 1967), *cert. denied*, 390 U.S. 1010 (1968); *Mackey v. Greenview Hosp., Inc.*, 587 S.W.2d 249 (Ky. Ct. App. 1979).

⁴⁶ *Drury v. Franke*, 57 S.W.2d 969, 984 (1933).

sit if challenged (implying bias to the juror). Since it is impossible to know in advance whether the answers will reveal bias, the judge is obligated to ask, or permit counsel to ask, the question.⁴⁷ Thus, as a general rule, *the trial judge must permit voir dire on any subject in which the answers might reasonably reveal actual or implied bias.*

The Kentucky courts have stated repeatedly that a legitimate goal of voir dire is to obtain information to exercise peremptories more effectively.⁴⁸ The trial court, however, has discretion to disallow inquiry when the question does not *directly* seek the existence of actual or implied bias.⁴⁹ An attorney probing indirectly for bias or seeking information about jurors from which to generalize about the jurors' attitudes toward the parties or the case is subject to the court's discretion.⁵⁰ Thus, a second rule can be stated: *it is within the trial court's discretion to allow or disallow a question which on its face does not seek evidence of actual bias or does not ask for facts from which bias may be implied.* Since the Kentucky high court has recognized the legitimate relationship between voir dire and peremptory challenges, this discretion generally should be exercised in favor of permitting the questioning.

⁴⁷ The Kentucky appellate courts, in their supervisory capacity, should reverse a trial court when it does not permit such inquiry. The United States Supreme Court has been reluctant to hold that restrictions on voir dire constitute a denial of the accused's right to a fair trial. In *Ristaino v. Ross*, 424 U.S. 589 (1976), the Court held that the trial court's refusal to permit voir dire about racial prejudices in the trial of a black man accused of robbing a white man was not a constitutional violation. In effect, the Court placed the burden on the defendant to show that the question would have revealed bias.

⁴⁸ *Lightfoot v. Commonwealth*, 219 S.W.2d 984, 989 (Ky. 1949); *Olympic Realty Co. v. Kamer*, 141 S.W.2d 293, 297 (Ky. 1940); *Drury v. Franke*, 57 S.W.2d 969, 984 (Ky. 1933).

⁴⁹ *Murrell v. Spillman*, 442 S.W.2d 590 (Ky. 1969); *Farmer v. Pearl*, 415 S.W.2d 358 (Ky. 1967).

⁵⁰ See *Farrow v. Cundiff*, 383 S.W.2d 119 (Ky. 1964) and *Temperly v. Sarington's Adm'r*, 293 S.W.2d 863 (Ky. 1956) for illustrations of the extent of the trial court's discretion. In *Temperly* the Court of Appeals affirmed the trial court, which had permitted the plaintiff's counsel to ask the jurors whether they had scruples or objections against returning a verdict for the full amount if the evidence justified it. In *Farrow* the trial court refused to permit a plaintiff to ask the question asked in *Temperly*; however, the Court of Appeals affirmed the decision as being within the trial court's discretion.

IV. THE INTERESTS OF THE ATTORNEY, JUDGE AND JUROR

While it is generally agreed that the legitimate purpose of voir dire is to uncover bias, there is little agreement over such important matters as: 1) the respective roles of judge and attorney in voir dire; 2) individual and sequestered questioning; and 3) the parameters of proper questioning. To understand the controversy it is helpful to analyze the interests of attorney, judge and juror in the voir dire process.

A. *The Attorney*

Assume an able, seasoned litigator who will investigate the jury panel as thoroughly as time and resources permit.⁵¹ He will make preliminary judgments regarding the jurors' suitability based on an analysis of the jurors' potential characteristics and the characteristics of the case.⁵² The attorney will

⁵¹ Trial manuals recommend such investigation where feasible. R. KEETON, *TRIAL TACTICS AND METHODS*, 252-53 (1973); I. GOLDSTEIN & F. LANE, *GOLDSTEIN TRIAL TECHNIQUES*, § 9.06 (1969).

A publication of the National Jury Project and National Lawyers Guild recommends a "community network" to provide information about prospective jurors. D. KAIRYS, *JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE*, 36-38 (1975). Recently, much attention has focused on the use of social scientists in preparing profiles of good and bad jurors, based on demographic and attitudinal studies of the community from which the jury is to be drawn. Such studies were employed in conjunction with pre-trial investigations of cases involving the Berrigan Brothers, Angela Davis, John Mitchell, and Maurice Stans. *Id.* at 33-35. See also Frederick, *Jury Behavior: A Psychologist Examines Jury Selection*, 5 OHIO N. L. REV. 571, 578 (1978); Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 17 JURIMETRICS J. 3 (1976); Schulman, *Recipe for a Fair Jury*, PSYCH. TODAY, May 1973, at 37-44; Note, *The Defendant's Right to an Impartial Jury and the Rights of Prospective Jurors*, 48 U. CIN. L. REV. 985, 991-94 (1979).

⁵² Lawyers are instructed to grade jurors first on the probability of favorable identification with the client or the cause. J. JEANS, *TRIAL ADVOCACY*, 172-73 (1975); T. MAUETT, *FUNDAMENTALS OF TRIAL TECHNIQUES*, 32-33 (1980). A second approach focuses on personality types and gives special attention to the "authoritarian juror." Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality*, 1968 WIS. L. REV. 734; Colson, *My Approach to Jury Selection for the Plaintiff*, *APPROACHES TO ADVOCACY*, 11-15 (G. Holmes ed. 1973); Frederick, *supra* note 51, at 581-83. Finally, the lawyer can fall back on ethnic, age, race and sex stereotypes. I. GOLDSTEIN, *supra* note 51, § 9.29. A humorous exposition of the latter approach was written by Clarence Darrow:

If a Presbyterian enters the jury box, carefully rolls up his umbrella, and calmly and critically sits down, let him go. He is cold as the grave; he knows right from wrong, although he seldom finds anything right. He believes in

view voir dire as an opportunity: 1) to reevaluate the jurors after seeing and hearing them in the courtroom; 2) to ingratiate himself with the jurors; and 3) to condition the jury for his theory of the case.⁵³ While only the first goal is legitimate, one commentator estimates that attorneys spend eighty percent of their voir dire time attempting to indoctrinate and ingratiate themselves with the jury and only twenty percent asking questions to screen the favorable from the unfavorable.⁵⁴ Thus, the attorney may view voir dire as a time for solicitous statements or argument in the form of rhetorical questions. The potential for conflict with the judge is obvious.

Most attorneys undoubtedly would say they *do* use information obtained during voir dire in exercising challenges, though a sense of fatalism does exist among the trial bar.⁵⁵ The able attorney, seeking to use voir dire to elicit information, may believe that jurors will not volunteer bias or divulge information that the juror believes will result in his being stricken.⁵⁶ Accepting these premises, the attorney feels that

John Calvin and eternal punishment. Get rid of him with the fewest possible words before he contaminates the others; unless you and your clients are Presbyterians you probably are a bad lot, and even though you may be a Presbyterian, your client most likely is guilty. If possible, the Baptists are more hopeless than the Presbyterians. They, too, are apt to think that the real home of all outsiders is Sheol, and you do not want them on the jury, and the sooner they leave the better.

The Methodists are worth considering; they are nearer the soil. Their religious emotions can be transmuted into love and charity. They are not half bad, even though they will not take a drink; they really do not need it so much as some of their competitors for the seat next to the throne. If chance sets you down between a Methodist and a Baptist, you will move toward the Methodist to keep warm.

J. JEANS, *TRIAL ADVOCACY*, 170 (1975).

⁵³ I. GOLDSTEIN, *supra* note 51, at §§ 9.33-74; J. JEANS, *supra* note 52, at 178, 191; T. MAUETT, *FUNDAMENTALS OF TRIAL TECHNIQUES* 37 (1980); and A. MORRILL, *TRIAL DIPLOMACY* 6-14 (1975). Excess usage of the trial manuals' advice has contributed to judge-conducted voir dire. Maxwell, *The Case of the Rebellious Juror*, 56 A.B.A.J. 838, 842 (1970).

⁵⁴ Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 522 (1965).

⁵⁵ *Id.* at 507.

⁵⁶ Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 548-49 (1975); Kerig, *Perceptions from a Jury Box*, 54 CAL. ST. B.J. 306, 307-08 (1979). See Broeder, *supra* note 54, at 510-14 for illustrations of the jurors' lack of candor.

questioning will be effective only if: 1) conducted by him rather than by the judge;⁵⁷ 2) individual rather than to the panel;⁵⁸ and 3) indirect rather than direct.⁵⁹ Indirect and persistent questioning is considered essential to reveal unconscious bias.⁶⁰ The attorney pressing for individual, somewhat rambling voir dire is probably one who fashions himself skilled (perhaps with the aid of a psychologist in attendance) in deciphering body language.⁶¹ The attorney who believes in body language wants to be face-to-face with a juror, asking

⁵⁷ Babcock, *supra* note 56, at 545; Gutman, *supra* note 8, at 303; Note, *The Jury Voir Dire: Useless Delays of Valuable Technique*, 11 S. DAK. L. REV. 306, 318 (1966); Note, *Voir Dire in Federal Criminal Trials: Protecting the Defendant's Right to an Impartial Jury*, 48 IND. L. J. 269, 276 (1973).

⁵⁸ D. KAIRYS, *supra* note 51, at 28; Comment, *State v. Manley*, 1969 VILL. L. REV. 214, 221; Comment, *Voir Dire in California Criminal Trials: Where is it Going? Where Should it Go?* 10 SAN DIEGO L. REV. 395, 408 (1973).

⁵⁹ Babcock, *supra* note 56, at 548-49; Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1508-09 (1975). Babcock relates the need for indirect questioning to the superiority of attorney-conducted voir dire.

Thus, for instance, when a potential juror responds that she has been the victim of a crime, the judge will typically ask whether this would tend to prejudice her in evaluating the testimony to be given in the case. An attorney conducting the voir dire would probe the nature of the crime, her evaluation of the police investigation and conduct toward her, whether she made an identification and testified in court. Such questions spring to the mind of the advocate, but would occur less often to the judge. This is true partly because the judge does not want to spend time asking the questions, partly because he does not have the advocate's awareness that soon he will be making peremptory challenges based on inferences from what prospective jurors have said, and partly because the judge does not know the case of either party in detail, so that he cannot realize when responses have opened areas for further inquiry.

Babcock, *supra* note 56, at 548-49.

⁶⁰ See Levitt, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 951-53 (1971), for an excellent example of persistent questioning before a very tolerant judge. This interrogation was praised in Note, *supra* note 59, at 1508.

⁶¹ F. BAILEY, & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS*, 104 (1971); G. NIERENBERG, & H. CALERO, *HOW TO READ A PERSON LIKE A BOOK* (1971). The basic assumption is that feelings and attitudes are communicated primarily by paralinguistic and kinesic responses. Paralinguistic responses are how a person speaks—pitch and tone, emphasis, pauses and disturbances; kinesic responses include eye contact, body movement and orientation, and facial expression. A trained psychologist may purport to intelligently rate a juror's acceptability by observing his kinesic and paralinguistic responses to judge and counsel. Frederick, *Jury Behavior: A Psychologist Examines Jury Selection*, 5 OHIO N. L. REV. 571, 583-84 (1978).

non-obvious questions to elicit involuntary body responses; rarely can he pass judgment on the attitude of jurors toward himself or his client from a position at counsel table listening to the judge question the panel.

B. *The Judge*

While the attorney almost certainly views voir dire as part of the adversarial process, the experienced judge will likely regard voir dire as preliminary to the adversarial trial. From the judge's viewpoint, voir dire's purpose is to obtain the most impartial jury possible.⁶² The judge will regard as improper efforts of attorneys to ingratiate themselves with and indoctrinate the jurors.⁶³ Further, the judge probably will regard as ineffectual attempts by counsel to identify unfavorable jurors. His experience as judge and lawyer will have led him to believe jurors to be unpredictable and the likelihood of improving a jury by challenge to be problematic.⁶⁴

⁶² G. BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION; PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES, 17-19 (1977).

⁶³ *People v. Crowe*, 506 P.2d 193, 199 (Cal. 1973); *State v. Manley*, 255 A.2d 193, 205 (N.J. 1969).

⁶⁴ The leading empirical study strongly supports this position. Hans Zeisel and Shari Diamond conducted an experiment in a federal court in Chicago in which struck jurors listened to the evidence and returned verdicts. The struck jurors' votes were compared with the verdicts of the actual juries. Although the results are not statistically valid because of the limited number of trials, the general conclusion is that the attorneys performed poorly and erratically in exercising challenges. The prosecutors collectively did not improve the jury at all, while defense attorneys' performances were only slightly better. Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 517 (1978).

Broeder reached the same conclusion in his earlier study in which he interviewed 225 jurors sitting on 23 cases in a midwestern federal district court over an 18-month period. He found voir dire and the exercise of challenges to be ineffective in eliminating unfavorable jurors. He cites many examples in which extremely partial jurors were not struck. Broeder, *supra* note 54, at 505-20. He concluded:

The message here is exceedingly clear: *Voir Dire* was grossly ineffective not only in weeding out "unfavorable" jurors but even in eliciting the data which would have shown particular jurors as very likely to prove "unfavorable." . . . As an institution for sifting out "unfavorable" jurors, voir dire cannot be effective. A lawyer simply cannot anticipate many of the factors in the jurors' backgrounds which will affect their thinking and there is a broad area in which perspicacity would not help anyway. Legal rules preclude many questions and other questions cannot be asked because of the

Since he is both neutral and an authority figure, the judge may feel that jurors will more candidly respond to his questions than to those of the obviously partisan attorneys, a rationale which supports judge-conducted voir dire.⁶⁵ At the same time the judge will resist attorneys' efforts to show actual bias on the part of jurors, because a challenge for actual bias carries moral condemnation that a challenge for implied bias lacks.⁶⁶ Thus, the judge may intervene to "save" jurors after counsel seemingly has established actual bias.⁶⁷ Finally, the judge will be conscious of his own time constraints and will be interested in expediting jury selection.⁶⁸ Indirect and time-consuming questions may result in the judge terminating

danger of offending. Again, veniremen do not always tell the truth when questioned. The data contain numerous instances of conscious concealment and lack of candor.

Id. at 505-06.

⁶⁵ Levitt, *supra* note 60, at 950-53.

⁶⁶ Babcock identifies reasons why judges are correct not to find actual bias except in the most obvious cases: (1) judges should not be forced to imply that a person who promises to be fair will not be fair; (2) the lack of certainty about unconscious biases make a judge's decision to excuse a juror for cause difficult to support when the juror has not admitted bias; and (3) permitting challenges for cause based on group associations would undermine the principles of community representation and democratic government. Babcock, *supra* note 56, at 1500-01.

⁶⁷ See *Brumfield v. Consolidated Coach Corp.*, 40 S.W.2d 356 (Ky. 1931), for a classic example of such an intervention. The issue was whether a bus company had wrongfully refused passage to a black woman. Plaintiff's counsel asked the jurors whether they believed blacks should ride with whites. Not surprisingly, a number said they did not. At this point, the trial court asked the following question:

In the event the court should instruct the jury that colored persons including the appellant had under the law a right to ride on defendant's bus at the same time white persons were riding, and this being the law of the case could you and would you follow the law in this respect as given by the court and would you wholly disregard your private opinion as to the rights of the plaintiff to ride on the bus with white people and try the case according to the law as given by the court?

Id. at 360. Despite the judge's attempt to save these jurors, several of them admitted that they could not abide by the court's instructions and were excused.

⁶⁸ There is some evidence that judge-conducted voir dire is quicker. Judicial Conference Committee on the Operations of the Jury System, *The Jury System in Federal Courts*, 26 F.R.D. 409, 467-68 (1961) [hereinafter cited as Judicial Conference Committee]. See Levitt, *supra* note 60, at 947-48, which states that the average judge-conducted voir dire lasts 64 minutes and the average mixed judge/attorney-conducted voir dire lasts 111 minutes. Attorneys, however, probably restrict their questioning whenever the judge appears irritated by lengthy voir dire. Broeder, *supra* note 54, at 505.

or taking over the questioning.

C. *The Juror*

Along with the judge and attorney, the juror has important interests in the voir dire process. After being called from his job and kept waiting on a hard bench for half the morning, the juror is finally called to the box, where he becomes a witness, under oath and without the assistance of counsel, answering questions in a case in which he is a stranger. After responding to inquiries that often seem irrelevant or overly personal, he is not selected for reasons unknown. The juror does not know whether he was peremptorily challenged or was not selected by luck of the draw.⁶⁹ If he suspects the former, he is resentful, because he wanted to serve and feels he would have been fair.

Jurors consider their time valuable and may resent protracted voir dire questioning.⁷⁰ Further, jurors may resent being singled out and required to speak in front of strangers,⁷¹ particularly if the question demands personal information.⁷² Dwan Kerig, a professor at San Diego University School of Law, wrote of his recent experience as a juror in San Diego County:

I saw two venirepersons become emotional in responding to counsel's questions about the psychiatric treatment each had received. A "good" (from a clinical attorney's point of view) voir dire probes deeper than any venireperson wishes. However, I do not think that the venireperson resents the attorney's probing, rather he/she just wishes that so many voyeurs were not present during the probing . . . Undressing before medical attendants is easy but not before other patients too.⁷³

⁶⁹ Ky. R. Civ. P. 47.02 (1979) and Ky. R. Crim. P. 9.32 (1979) provide means for dismissing a juror without informing him if he was challenged.

⁷⁰ Broeder, *supra* note 54, at 526.

⁷¹ *Id.*

⁷² See Maxwell, *supra* note 53, at 838, where the commentator hypothesized a case in which a juror refused to say whether he or his wife ever were members of an activist group. The juror was held in contempt and imprisoned; ultimately the contempt citation was overturned by the United States Supreme Court.

⁷³ Kerig, *Perceptions from a Jury Box*, 54 CAL. ST. B.J. 306, 307 (1979).

A juror will certainly resent any implication that he cannot be fair and will resent what appear to be meritless challenges to his fellows.⁷⁴

D. *The Conflicting Interests*

Apply this interest analysis to the issues identified at the beginning of this section and the conflict is apparent. The first issue is the role of the attorney in voir dire. The attorney will seek to ask most of the questions, while the judge may see a judge-dominated voir dire as of equal or greater effectiveness, taking less time and without possibility of ingratiation or indoctrination. The juror probably does not care who asks the questions but does prefer that the process take as little time as possible.

The second issue is whether individual questioning should be permitted. Assuming that jurors will not volunteer information, the attorney presses for individual questioning in order to force jurors to respond. The juror prefers not to be questioned individually; however, if there is to be individual questioning on sensitive matters, he prefers that it be done privately. Conscious of the time involved, the judge may or may not be receptive to individual questioning.

The final issue involves the parameters of proper questioning. The attorney will seek the widest possible latitude, and this will be resented by the judge, unimpressed with the efficacy of indirect questioning and suspecting disguised indoctrination. The juror will resent personal, seemingly irrelevant questioning that prolongs voir dire.

Take, as an example, voir dire on the defense of insanity.⁷⁵ Seeking sympathetic jurors, the defense attorney wants to sit privately with each prospective juror and find out whether mental illness has afflicted any member of that juror's family. The juror would prefer not to be questioned at all on such matters; if such questioning is to occur, however, he would like it to be done privately. The judge is skeptical

⁷⁴ Broeder, *supra* note 54, at 526.

⁷⁵ See *Brundage v. United States*, 365 F.2d 616, 618 (10th Cir. 1966) for an analysis of voir dire on the insanity defense.

about the relationship between a family history of mental illness and sympathy toward the insanity defense. He suspects the defense attorney of indoctrination and believes this type of inquiry to be too time-consuming. Since discretion is lodged in the trial court, the judge's view will prevail. Each of the three positions, however, is tenable.

V. SURVEY OF KENTUCKY CIRCUIT JUDGES

A. *Background of this Study*

There has been no previous systematic study of voir dire practices in Kentucky circuit courts. A report of a 1964 seminar, however, contained the following conclusions:

The Voir Dire: Mechanics

The Kentucky practice, which follows the federal rules, presumably would allow the trial judge to conduct the *voir dire* to the exclusion of the trial attorneys, with the attorneys being forced to make specific requests to the judge for him to ask questions of the jurors. However, the overwhelming sentiment and philosophy of the judges was to "let the lawyers try the case." Most of the judges do ask some preliminary questions of the jury and then turn the *voir dire* over to the attorneys. Generally they require the lawyers to address the panel as a whole in civil cases, but do not in criminal cases. The judges stated that they control the *voir dire* at all times under the primary test of whether the lawyer's conduct is consuming an undue amount of time. The general observation was that the Kentucky attorneys did not abuse the *voir dire* by lengthy questioning. The idea was promoted that formal biographical questionnaires should be filled out in advance by each prospective juror and should be made available to the lawyers in order to eliminate some of the questioning on *voir dire*. A poll of the judges indicated that none were following this procedure, though some judges have their clerks fill in basic biographical data for use by the attorneys. It seems to be an unknown factor the degree to which prospective jurors' backgrounds and privacy are subjected to scrutiny by professional investigators who report their findings to the attorneys. The overall question was posed as to what effect these practices might have upon the jurors' attitude toward the judge, attorneys and parties to a

law suit. To the extent that this is or may become a problem, formalized questionnaires may help in minimizing it.

Voir Dire: Content of Questions

As to the proper limitations upon the content of questions that could be asked upon *voir dire*, there was no substantial agreement. The general sentiment, however, seemed to run in favor of the Illinois rule prohibiting questions on specific elements of law or evidence to be adduced in that case, though some dissented from this view. Again there was substantial agreement against allowing what was termed "Belli-type questions." However, when confronted with a concrete case, the judges were divided as to the propriety of *voir dire* questioning of the juror about his feelings toward the proper amount of damages. This question was posed in the 1963 West Virginia case of *Thornsbury v. Thornsbury* where in an automobile case for wrongful death, plaintiff's counsel propounded to the jury this question: "Should the evidence disclose to you and you should be of the opinion that the plaintiff is entitled to win, entitled to recovery, do you feel that 25,000 dollars is too much for the death of a sixteen year old girl?" The trial court refused to allow the question and the appellate court affirmed it on this point on the theory that the question made no contribution to accomplishing a fair trial or to the proper administration of justice.⁷⁶

⁷⁶ Kennedy, *Judge-Jury-Counsel Relations in Kentucky*, 54 Ky. L.J. 243, 246-47 (1966). The suggestion in the 1964 report that biographical questionnaires be utilized has been implemented. In 1976 the Kentucky General Assembly enacted a law requiring summoned jurors to complete and return to the court a combination summons and qualification form. Unless otherwise directed by the court, this form is made available to the parties or their attorneys. Ky. REV. STAT. § 29A.070(6) (1977) [hereinafter cited as KRS]. The form, prepared by the Administrative Office of Courts, tracks the juror qualification statute. See Form AOC-77-401 [appendix 1 herein]. The form also solicits information that does not relate to juror qualification but that may be of interest to attorneys during the selection process. The juror qualification statute provides:

- (1) The chief circuit judge or another judge designated by him shall determine on the basis of the information provided on the juror qualification form whether the prospective juror is disqualified for jury service for any of the reasons listed in subsection 2 of this section. He shall enter this determination in the space provided on the juror qualification form and on the list of names drawn from the jury wheel. The chief circuit judge shall cause each disqualified juror to be immediately notified of his disqualification.
- (2) A prospective juror is disqualified to serve on a jury if he:

As the above remarks indicate, judicial attitudes toward voir dire are divergent. In light of the fact that the mechanics⁷⁷ and content⁷⁸ of voir dire are inherently within the discretion of the trial courts, an awareness of how that discretion is being exercised should benefit both judges and attorneys. A judge from one circuit may take a hands-off attitude, permitting the attorneys to ask most of the questions and exercising little control over the content of the questions. A judge from another circuit, on the other hand, may ask all the questions and require counsel to demonstrate that a proposed question bears directly on a showing of actual or implied bias. This survey was undertaken to analyze voir dire practices in the state, to share that analysis with the bench and bar, and to make recommendations to guide the discretion of the trial courts. The survey consisted of a comprehensive questionnaire⁷⁹ that was sent to all circuit judges in the state. Of Kentucky's eighty-seven circuit judges, sixty-seven completed the questionnaire. Follow-up interviews were conducted with fifteen randomly-selected judges. It is hoped that presentation of the survey's results, along with the author's recommendations, will aid in the administration of this important aspect of the

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- (a) Is not a citizen of the United States; or
 - (b) Is not a resident of the county; or
 - (c) Is unable to speak and understand the English language; or
 - (d) Is incapable, by reason of his physical or mental disability, of rendering effective jury service; or
 - (e) Has been previously convicted of a felony and has not been pardoned by the governor or other authorized person of the jurisdiction in which he was convicted; or
 - (f) Is presently under indictment; or
 - (g) Has served on a jury within the past twelve (12) months.

(3) There shall be no waiver of these disqualifications.

KRS § 29A.080 (1977).

⁷⁷ Ky. R. Civ. P. 47.01 (1979) and Ky. R. Crim. P. 9.38 (1979) give the judge control over who asks the questions. *Davies v. Griffin*, 470 S.W.2d 323 (Ky. 1971) and *Woodford v. Commonwealth*, 376 S.W.2d 526 (Ky. 1964) make it clear that the judge controls individual questioning.

⁷⁸ *Farmer v. Pearl*, 415 S.W.2d 358 (Ky. 1967); *Farrow v. Cundiff*, 383 S.W.2d 119 (Ky. 1964); *Temperly v. Sarrington's Adm'r*, 293 S.W.2d 863 (Ky. 1956).

⁷⁹ See G. BERMANT, *supra* note 62, at 5, 13, & 19 for sources of the first three questions. The author of this article is responsible for the content of the other nine questions. Professor Ron Dillehay of the University of Kentucky Department of Psychology assisted in the wording of the questions.

litigation process.

B. *Judicial Attitudes*

A judge's view of the relationship between voir dire and the adversary process is an important factor in his exercise of discretion during voir dire. Table 1 reflects the position held by Kentucky circuit judges.

Table 1. Voir Dire and Adversarial Advocacy

<u>9.4%</u>	(1) The selection of a jury should precede the beginning of adversarial advocacy. The selection of the jury for a case should be as independent of the adversary process as is the selection of the judge for that case.
<u>43.8%</u>	(2) Ideally, perhaps, the selection of a jury should precede the beginning of adversarial advocacy. For reasons of tradition and to insure a sense of full participation in the trial, however, it is wise for the judge to grant counsel the opportunity to examine potential jurors, either directly or indirectly.
<u>23.4%</u>	(3) The selection of the jury falls properly within the scope of adversarial advocacy. Lawyers deserve the right to question each potential juror, either directly or indirectly.
<u>23.4%</u>	(4) Adversarial advocacy is the most effective means of choosing an impartial jury. Just as the adversary process is a good method for arriving at the truth of testimony, so is it a good method for the selection of impartial jurors.

These results show that almost half of the responding judges feel that voir dire is properly a part of the adversary process. Most of the remaining judges (43.8%) view attorney questioning as wise, in order to ensure a sense of full participation or out of respect for tradition. Thus, an overwhelming percentage of judges believes that voir dire, to some extent, is part of the adversarial process. These views should be con-

trasted with those held by federal district court judges interviewed in 1977. The results of this survey reflect a distinctly different attitude among federal judges.⁸⁰

Table 1a.

<u>56%</u>	The selection of a jury should precede the beginning of adversarial advocacy. The selection of the jury for a case should be as independent of the adversary process as is the selection of the judge for that case.
<u>28%</u>	Ideally, perhaps, the selection of a jury should precede the beginning of adversarial advocacy. For reasons of tradition and to insure a sense of full participation in the trial, however, it is wise for the judge to grant counsel the opportunity to examine potential jurors, either directly or indirectly.
<u>8%</u>	The selection of the jury falls properly within the scope of adversarial advocacy. Lawyers deserve the right to question each potential juror, either directly or indirectly.
<u>5%</u>	Adversarial advocacy is the most effective means of choosing an impartial jury. Just as the adversary process is a good method for arriving at the truth of testimony, so is it a good method for the selection of impartial jurors.
<u>3%</u>	No answer.

In the follow-up portion of the survey, judges were asked if attorneys attempted to influence the jury during voir dire. Most replied that lawyers would, if they thought they could get away with it. One judge commented that lawyers exerted their "main effort to try the case during voir dire." Several judges said that attorneys shied away from indoctrination questions only because they knew the judge frowned on such tactics.

⁸⁰ *Id.* at 19.

Judicial attitudes toward efforts to persuade varied greatly. Four of the fifteen judges interviewed were tolerant of attorneys' efforts to persuade; however, one indicated he would sustain an objection if made. Seven judges deemed such efforts improper and indicated they would act to curtail attempts to sway the jury. The other four were in the middle; the impression from the interviews was that these judges gave attorneys a limited opportunity to persuade.

Additionally, the judges were asked whether lawyers, in exercising their peremptory challenges, relied primarily on information from the jury qualification sheets and voir dire or on information obtained through investigation and independent knowledge. The results indicated that attorneys from urban counties rely on the juror qualification sheets and voir dire. This is particularly true in Jefferson County, where jurors are drawn from a large pool on the day of the trial. Judges who sit in primarily rural circuits feel that better lawyers investigate the panel prior to trial; those lawyers will then rely on what they have learned prior to voir dire in the exercise of peremptory strikes. One judge said, "it is essential to investigate the panel in order to intelligently strike." The judge was not referring to clandestine surveillance but to the practice of discussing the jury list with local residents familiar with the community.

In response to questions about the effectiveness of lawyers in exercising strikes, the judges indicated that the most effective attorneys were those who knew or had investigated the members of the jury panel. The judges were less complimentary of strikes based on the qualification form and voir dire questioning. Responses included: "plain old toss-up," "far from an exact science; pretty good on the obvious ones," "you can't predict what a juror will do," and "as far as selection is concerned, voir dire does not amount to a hill of beans." Of course many judges responded that attorney effectiveness could not be judged, since the way a struck juror would have voted is unknown. Several judges noted that attorney effectiveness may be judged in terms of the jurors which are stricken by opposing counsel. Under Kentucky's rules of civil and criminal procedure, attorneys strike from a list of eighteen

persons in civil trials and twenty-five in criminal trials, without knowing the opposing counsel's strikes. Rarely, said these judges, do attorneys strike the same juror.

The Kentucky circuit judges were polled for their opinions of jurors' candor in responding to group questions. A jury study in the late 1950's by Dale Broeder of the University of Chicago had revealed many instances in which pertinent information was concealed by jurors,⁸¹ and in light of the Broeder study, the responses to the questionnaire by Kentucky judges were somewhat surprising.

Table 2. Candor of Jurors: Response to Group Questions

Place a check mark next to the statement that most clearly approximates your belief as to the candor of prospective jurors in responding to questions to the panel on voir dire (not to him individually). The term "non-neutral," as used here, means any response which might be embarrassing to the juror or, from the juror's point of view, might cause him to be rejected.

- | | |
|--------------|---|
| <u>65.7%</u> | 1) Jurors generally volunteer relevant information, even though non-neutral, in response to questions put to the panel. |
| <u>23.9%</u> | 2) Jurors generally do not volunteer relevant non-neutral information in response to questions put to the panel, though juror will generally volunteer neutral information. |

⁸¹ Broeder interviewed 225 jurors who had served on 23 cases in a midwestern federal district court. Broeder found seventeen instances of misconduct in ten trials, including: a juror who recently had been disfigured in an auto accident but said nothing in response to a general inquiry about involvement in auto accidents; a juror who had been over-compensated for personal injury and property damage sustained in collision with defendant's train but who did not reveal this to plaintiff's counsel; a juror who knew the plaintiff's family well but did not reveal it when the panel was queried about connections with the parties; and two jurors who both felt that insurance companies should pay regardless of fault and intended to press that view with the other jurors. Broeder, *supra* note 54, 510-14.

- 10.4% 3) Jurors generally do not volunteer relevant information, neutral or non-neutral, in response to questions put to the panel.

Two-thirds of the responding Kentucky judges believe jurors candidly answer questions put to the panel, even though a truthful answer might be embarrassing or cause the juror to be rejected. Follow-up interviews, however, suggest a qualification of this finding. The questionnaire did not ask judges to distinguish jurors' candor when asked for specific factual information (*e.g.*, acquaintance with a witness) from their candor when asked for feelings toward a characteristic of the party or the case (*e.g.*, how jurors feel about people who drink). When asked to make this distinction, most judges indicated that jurors were honest in disclosing factual information but were less forthright when asked about their attitudes. This conclusion is not surprising. No one is truly neutral, and it is unrealistic to expect even conscientious jurors to recognize and admit their biases.

Judges feel, however, that most jurors will not deliberately withhold or misrepresent specific facts. Jury orientation sessions stress the need for candor and often suggest that jurors hold up their hands if there is anything they think should be brought to the court's attention. In the follow-up interviews, some judges noted that jurors were extremely candid and anxious to discuss even irrelevant matters. Several judges, however, mentioned the reluctance of their jurors to speak out before a group. The judges indicated that they attempted to relieve the jurors' fears by encouraging them to approach the bench with their concerns. One Jefferson County judge stated that jurors tend to be more candid with the judge than with attorneys. Jurors view the judge as a neutral authority figure and, thus, do not believe the judge will trick or embarrass them.

C. *Voir Dire: The Mechanics*

1. *Attorney Participation*

Despite a feeling among some judges that jurors are more

likely to be candid with judges than with attorneys, the responses to the questionnaire indicate a willingness to permit attorneys to examine jurors extensively. The following table reflects the extent to which circuit judges permit attorneys to participate in voir dire in criminal and civil cases.

Table 3. Lawyer Participation in Voir Dire

Please place a mark beside the statement that most accurately reflects your usual practice in the conduct of voir dire examination in typical civil and criminal cases:

<u>Civil</u>	<u>Criminal</u>	
<u>1.5%</u>	<u>3.0%</u>	1) I conduct the entire examination. I accept additional questions from counsel, but I often edit or restate the questions before asking them.
<u>0%</u>	<u>0%</u>	2) I conduct the entire examination. I accept questions from counsel and usually ask them in the form requested.
<u>13.6%</u>	<u>15.2%</u>	3) I conduct an initial examination. I then allow counsel to supplement my questions. The questioning of counsel, however, is pursuant to a prior understanding between counsel and myself concerning the scope and duration of the questions.
<u>63.6%</u>	<u>62.1%</u>	4) I conduct an initial examination. I then give counsel a free hand in the subsequent questioning of panel members, though I may intervene if the questioning becomes irrelevant or too long.
<u>12.1%</u>	<u>12.1%</u>	5) I permit counsel to conduct the entire examination following my introductory remarks though I may intervene if the questioning becomes irrelevant or takes too long.

9.2% 7.6% 6) I permit counsel to conduct the entire examination following my introductory remarks. I rarely intervene in the attorney's voir dire.

0% 0% 7) I am not present during voir dire.

The results reveal an impressive consensus. Three-fourths of the responding judges conduct an initial examination and permit attorneys to supplement the court's questions (categories (3) and (4)). This approach might be termed the Jefferson County Model since it corresponds to Rule 1804 of the Jefferson Circuit Court.⁸² The Jefferson County Model is dominant

⁸² Jefferson County has a local rule requiring the judge to ask certain questions before the attorneys are permitted to ask questions. Two of the Jefferson circuit judges interviewed indicated that they did not follow the rule verbatim but instead used their own questions. The rule provides:

Before the attorneys are permitted to interrogate a jury panel, qualifying questions, substantially as follows, shall be asked the jury panel by the court, after stating the names of the parties and the nature of the controversy.

1. Does any member of the panel know anything about this controversy?
2. Has any one talked to you about this controversy or about it in your presence?
3. Are you related by blood or marriage to any of the parties (naming them)?
4. If one of the parties is a corporation, are you an officer, agent, stockholder, bondholder or employee of such corporation?
5. Plaintiff's counsel is _____. Has he, or any member of his firm, been your attorney for any purpose within the past five years?
6. Defendant's counsel is _____. Has he, or any member of his firm, been your attorney for any purpose within the past five years?
7. Have you, or your wife or husband, had a claim for damages, or a claim similar to the one being asserted herein, against any person, firm or corporation at any time?
8. (As to any who have had such claims) Would the fact that you have had such a claim affect your judgment in this case?
9. At any time, has there been brought or made against you, or your wife or husband, a suit or claim for damages?
10. As to any who have had such a claim or suit against you, or your wife or husband, would the fact that you have had such a claim or suit against you, or your wife or husband, affect your judgment in this case?
11. The parties in this case and the court desire that each juror selected to try this case shall be disinterested and impartial and that the verdict will reflect the honest opinion and unprejudiced judgment of the jury. Is there any reason why you cannot give to the consideration of this case your careful attention and by the verdict say what your honest opinion and judg-

not only in Louisville, where twelve out of thirteen judges employ it, but in the rest of the state as well. That relatively few (fourteen of sixty-six) judges permit counsel to conduct the entire examination is not surprising; to find, however, that only two judges deny attorneys the right to ask any questions was unexpected. In contrast, seventy percent of the federal district judges responding to a similar questionnaire in 1977 indicated they asked all the questions.⁸³ Kentucky judges almost uniformly give attorneys some opportunity to address the jury during voir dire, a position adopted by the American Bar Association in 1968.⁸⁴

2. *Length of Voir Dire*

Table 4 reflects the average length of voir dire in Kentucky circuit courts and federal district courts. That the estimated durations of voir dire are basically the same supports the proposition that attorney involvement generally does not increase the length of voir dire.⁸⁵

Table 4. Length of Voir Dire

Please place a mark beside the range of time that most accurately represents the amount of time usually taken to

ment is?

JEFFERSON CO. CT. R. 1804.

⁸³ G. BERMANT, *supra* note 62, at 5. This study confirms a trend in federal courts toward reducing the role of attorneys in voir dire. Judicial Conference Committee, *supra* note 68, at 466.

⁸⁴ ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY, 2.4 (app. draft 1968).

A voir dire examination should be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge should initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge should then put to the prospective jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the cause on trial. The judge should also permit such additional questions by the defendant or his attorney and the prosecuting attorney as he deems reasonable and proper.

Id.

⁸⁵ A 1971 study in Los Angeles found attorney involvement to substantially increase the duration of voir dire. Levitt, *supra* note 60, at 947-8.

complete the voir dire examination (including challenges) for typical civil and criminal cases in your courtroom:

Kentucky Circuit Courts	Federal District Courts ⁸⁶
(1980)	(1977)

<u>Civil</u>	<u>Criminal</u>	<u>Civil</u>	<u>Criminal</u>	
36.9%	15.2%	33%	16%	Less than thirty minutes
55.4%	62.1%	49%	49%	Thirty minutes—one hour
7.7%	21.2%	14%	28%	One—two hours
0%	1.5%	1%	5%	Two—three hours
0%	0%	0%	2%	Three—five hours
0%	0%	0%	0%	More than five hours

The difference in the estimated durations of voir dire in civil and criminal cases is significant. Of the sixty-five Kentucky judges who responded to this question, twenty-six estimated that criminal voir dire took longer (three said civil took longer, and thirty-six said there was no difference). In follow-up interviews, the longer criminal voir dire was attributed to the seriousness of criminal sanctions, to the defense lawyer's need to guard against later claims of incompetency, to the defense attorney's repetition of reasonable doubt and presumption of innocence, and to defense attempts to find the one person who would hang the jury. Most judges, however, said the length of voir dire is dependent upon the attorneys and the case, and that criminal voir dire need not last longer. Several judges credited the strike list juror selection method of revised Kentucky Rule of Criminal Procedure 9.36 with expediting criminal voir dire.⁸⁷

3. *Role of the Judge in the Absence of Objections*

As previously mentioned, almost half of the Kentucky judges responded that attorney-conducted voir dire is properly part of the adversary process. This philosophical position does not prevent those same judges from intervening, *sua sponte*, when voir dire becomes tiresome or overly personal.

⁸⁶ G. BERMANT, *supra* note 63, at 13.

⁸⁷ The strike method of Rule 9.36 expedites the process because attorneys are no longer required to exercise their challenges during the questioning of the jurors.

Table 5 reflects the extent to which Kentucky judges intervene in an attorney's conduct of voir dire in the absence of objection from the adversary.

Table 5. Voir Dire: Role of the Judge in the Absence of Objection

<u>6.2%</u>	1) I do not intervene in an attorney's conduct of voir dire unless the other side objects.
<u>69.2%</u>	2) I intervene in an attorney's conduct of voir dire in the absence of objection, if it appears that the attorney is wasting time or is embarrassing a juror.
<u>22.3%</u>	3) I intervene in the attorney's conduct of voir dire, in the absence of objection, whenever the content or form of the question is such that an objection would be sustained if made.
<u>2.3%</u>	4) I conduct the voir dire myself, therefore this question is inapplicable.

Most judges indicated they would intervene in the absence of objection only if an attorney were wasting time or embarrassing a juror. A sizeable minority, however, said they would intervene whenever a question was objectionable for any reason. One judge said he would intervene if a juror were being embarrassed but not if the question were merely prejudicial to the other side. Opposing counsel may be relied on to object if he feels the improper question damages his cause. He cannot be relied on to object when the question is objectionable because it infringes on a juror's right of privacy. The adversary system may protect against improper efforts of persuasion but cannot be relied on to protect a juror's right of privacy.

4. *Form of Voir Dire: Individual Questioning*

One of the most controversial voir dire issues is whether an attorney should be permitted to single out a juror for questioning. The attorney will urge that individual questioning is essential to obtain candid responses. Further, he may use the

technique of singling out a juror as a prod to get the jurors talking or as a means to indoctrinate the jury. The judge may react to protect the jurors or to halt the indoctrination. The conflict between judge and attorney can be sharp.⁸⁸

Judges from Kentucky were asked their practice when the particular question was one that could be put either individually or to the panel as a whole. The accompanying explanation was:

A *group* question is a question to the panel of prospective jurors. Ordinarily such a question does not demand an individual response, though occasionally an attorney will ask a question to the panel and attempt to elicit answers from each juror. An example would be for the attorney to ask if the jurors accepted the proposition that his client was presumed to be innocent, asking each juror to raise his hand. An *individual* question is directed to a specific juror and requires a response of him.

The selections below seek your general practice when the question is *not* one that must be asked individually. An example of a question that must be asked individually is, "Juror No. Four, how many children do you have?" An example of a question which need not be asked individually is, "Have you been the victim of a burglary?"

The judges' responses show considerable differences.

Table 6. Form of Voir Dire: Individual Questioning

<u>15.7%</u>	1) Attorneys may ask the same question to each juror and elicit individual responses.
<u>36.6%</u>	2) Attorneys may ask a question to the panel and elicit individual responses.

⁸⁸ See *United States v. Anderson*, 562 F.2d 394 (6th Cir. 1977) for an illustration of this conflict.

He [defense counsel] then addressed a prospective juror by name and asked whether that juror would want the accused to testify. The court [Judge B.T. Moynahan, Jr.] asked counsel to approach the bench and admonished him for singling out a juror and questioning him in an argumentative manner. He informed counsel that he would only permit a juror to be questioned individually when that juror gave an unsatisfactory response to a general question asked of the panel.

Id. at 396.

- 17.9% 3) Attorneys may not ask individual questions nor elicit individual responses unless I believe it is *probable* that the candid response of one or more jurors will provide information for challenge for cause or the intelligent exercise of peremptory challenges.
- 29.9% 4) Attorneys may not ask individual questions except when necessary to follow up answers volunteered by jurors in response to questions put to the panel.
- 0.0% 5) Attorneys may not ask individual questions nor elicit individual responses.

The lack of consensus on this question was borne out by the follow-up interviews. One judge stated: "I think it's very improper. The jurors are captive. They're sitting in the box by order of the court, sworn to answer questions. The court should protect jurors against any attempt by lawyers to single them out." Another judge said that individual questioning was seldom used but was very effective when employed. Still another replied that individual questioning was used in all trials in his court.

Obviously, jurors prefer not to be singled out for questioning before the panel. At present there is no consensus among the judges on the issue of when, and under what circumstances, individual questioning is proper. There is need for a standard recognizing jurors' interest in privacy and describing the conditions under which individual questioning is proper. Uniform treatment of this issue is highly desirable. Part VI (B) of this article recommends a standard for adoption.

6. *Form of Voir Dire: Sequestered Questioning*

Closely related to the issue of individual questioning is that of private questioning. Kentucky judges were asked to indicate their practice with the following explanation:

Attorneys will, on occasion, wish to question a juror outside the presence of the other jurors. This can occur when a can-

did response may be embarrassing to the juror or prejudicial to the defendants. Attorneys may further seek sequestered questioning on the premise that jurors will be candid in revealing their biases if jurors are not forced to make a public declaration of bias.

Table 7 indicates the judges' reluctance to permit sequestered questioning except on a showing of potential juror embarrassment or prejudice to one of the parties.

Table 7. Form of Voir Dire: Sequestered Questioning

<u>5.4%</u>	1)	I permit sequestered questioning of jurors if requested by an attorney.
<u>12.4%</u>	2)	I permit sequestered questioning on a matter when I believe it is <i>possible</i> a juror will not respond candidly to a group question.
<u>16.3%</u>	3)	I permit sequestered questioning on a matter when I believe it is <i>probable</i> a juror will not respond candidly to a group question.
<u>53.5%</u>	4)	I do not permit sequestered questioning of jurors unless it is clear that the juror is embarrassed or that the juror's response will prejudice one of the parties.
<u>12.4%</u>	5)	I do not permit sequestered questioning of jurors.

In follow-up interviews, judges said that attorneys rarely request sequestered questioning in advance. Rather, the need for private questioning generally becomes apparent as a result of an answer to a previous question. One judge provided the following example:

Q: "Have any of you been represented by the firm of Smith and Smith?"

Juror: "Yes, I have."

Q: "Is there anything about that representation that might affect your judgment in this case?"

Juror: "Well . . . maybe."

At this point the judge would intervene and call the juror to the bench. The anticipated response might embarrass Attorney Smith, the juror, or both. Another judge pointed out that

all questioning about a juror's employment with or interest in an insurance company should be done at the bench to avoid interjecting the issue of insurance coverage into the case.⁸⁹ In death penalty cases, several judges indicated they are likely to grant requests for sequestered questioning in advance.⁹⁰

One judge suggested a way to put personal questions to the panel and yet enjoy the candor of sequestered questioning. The judge should inform the jury that a series of personal questions will be asked and instruct each juror to raise his hand if the truthful answer to any of the questions is affirmative. Upon raising his hand, the juror would be questioned at the bench. The questioner should frame his questions so broadly that no particular inference can be drawn from the juror raising his hand. To illustrate this approach, consider the problem raised by a need to inquire into the jurors' family histories of mental illness. If the attorney (or judge) were to ask, "How many of you have a family history of mental illness?", the jurors would be embarrassed and resentful. They probably would not give complete and honest answers. Suppose, however, after an explanation of the need for the inquiry, the questioner were to say, "If you, any member of your family, or any friend or acquaintance has had any problems with mental illness, would you so indicate by raising your hand? We'll discuss it further at the bench." The juror should realize that holding up his hand does nothing more than identify him as one who knows a person who is mentally ill. No stigma is attached to being the acquaintance of the mentally disturbed. This suggestion combines group questions with individual private responses; implementation should promote candor and save time.

⁸⁹ If a good faith basis exists for believing a juror or his family works for an insurance company, follow-up questions are proper to determine whether the juror's company is involved in the case. *Insko v. Cummins*, 423 S.W.2d 261 (Ky. 1968); *Ashland Sanitary Milk Co. v. Messersmith's Adm'r*, 32 S.W.2d 727 (Ky. 1930). Obviously, such questioning should not be initiated in the presence of the other jurors.

⁹⁰ In *Brown v. Commonwealth*, 49 S.W. 544 (Ky. 1899), the juror being examined exclaimed in the presence of ten previously accepted jurors that the accused "ought to be hung." The trial court refused to excuse the accepted jurors, and the defendant was convicted and sentenced to death. The Court upheld the death penalty.

D. *Voir Dire: Content*

1. *Juror Background Information*

The Administrative Office of Courts developed a standard Juror Summons and Qualification Form⁹¹ that asks seven questions pursuant to the juror qualification statute⁹² and many other questions that do not relate to the juror's qualifications. The latter questions seek the following information from the juror:

- 1) Birthplace;
- 2) Occupation, employer's name and years employed;
- 3) Spouse's occupation, employer's name and years employed;
- 4) Marital status;
- 5) Number and ages of children;
- 6) Level of education;
- 7) Whether juror or any member of the juror's family has made a claim for personal injury;
- 8) Whether any claim for personal injury has been made against juror or a member of the juror's family;
- 9) Whether juror or a member of the juror's family has been a party to a lawsuit and, if so, the kind of lawsuit; and
- 10) Whether juror or any member of the juror's family has been a defendant or a witness or the complainant in a criminal case and if so, the year, county and state of the case.

It is questionable to imply, as the standard form does, that prospective jurors must answer questions under penalty of law that are irrelevant to the juror's qualification to serve. A more reasonable approach would require jurors only to an-

⁹¹ Appendix 1 contains a standard juror qualification form.

⁹² See note 76 *supra* for text of the juror qualification statute. The following questions were adapted from that statute:

- 1) Are you a citizen of the U.S.?_____
- 2) Are you able to speak and understand English?_____
- 3) Are you incapable, by reason of physical or mental disability, of rendering effective jury service?_____
- 4) Have you been convicted of a felony and not pardoned?_____
- 5) Are you presently under indictment?_____
- 6) Have you served as a juror in a Kentucky state court within the last 12 months?_____
- 7) What county are you a resident of?_____

swer questions that relate to qualification and permit jurors to refuse disclosure on other matters on the form.

In addition to the data provided in the Juror Summons and Qualification Form, attorneys may seek other background information during voir dire in an attempt to analyze the personalities of jurors and predict how those personalities will react to the parties and issues. Kentucky circuit judges were asked to indicate their attitudes toward such questions. Table 8 reflects a relaxed attitude toward this type of questioning.

Table 8. Background Information

<u>9.2%</u>	1)	I permit attorneys to freely ask jurors additional questions about their background (examples: what magazines they subscribe to, what television programs they watch, whether they own their homes or rent, what kind of car they drive).
<u>58.5%</u>	2)	I permit attorneys to ask jurors additional questions about their backgrounds <i>if</i> it can be demonstrated that the answers may provide relevant information for the intelligent exercise of peremptory challenges.
<u>30.8%</u>	3)	I permit attorneys to ask jurors additional questions about their backgrounds if the question is <i>directly</i> relevant and the attorney's need for this information <i>outweighs</i> the jurors' right of privacy.
<u>1.5%</u>	4)	I feel that the juror qualification sheets furnish sufficient information about the jurors for the exercise of peremptory challenges. I do not permit attorneys to ask further background questions of the jurors.

The responses to this question are surprising. Only thirty percent of the judges said they require attorneys to show that their questions are directly relevant and their need for information outweighs the jurors' right of privacy. Sixty percent said it is sufficient if the attorney shows that the answers might provide relevant information; almost ten percent said they permit attorneys to freely question jurors about their

backgrounds. These responses indicate that judges do not feel it necessary to keep tight control over this type of questioning.

This conclusion is supported by the judges' responses to other questions. A majority of judges said that attorneys asked additional information questions in at least three-fourths of their cases, and a large majority indicated that they rarely or never sustained an objection (or intervened without objection) to such a question. Thus, attorneys are permitted in most of the circuit courts to question jurors freely about their backgrounds. Nevertheless, it should be remembered that 69.2% of the judges said they would intervene if the attorney was wasting time or embarrassing a juror. This response indicates that attorneys generally do not advance questioning to the point where the judge feels intervention is necessary. The judges who indicated they rarely sustain an objection to this type of question may subconsciously communicate the permissible boundaries of voir dire to attorneys in their community. The wise attorney does not venture past this line, and thus the judge is not required to punish transgressors.

Additionally, the judges were asked their opinions about two questions dealing with juror background, currently asked in Fayette County.⁹³ Both were endorsed overwhelmingly by the judges. The questions were the juror's prior jury service and whether the juror, his relatives or friends were involved in law enforcement. Eighty-five percent of the judges found the question of prior jury service appropriate, while ninety-nine percent approved the inquiry into law enforcement connections.

2. Jurors' Knowledge of or Relationship to the Case

The judges were given a list of specific questions dealing with the jurors' knowledge of or relationship to the case. In contrast to inquiries into jurors' backgrounds, the answers to these questions could give rise to a challenge for actual or implied bias, and the Kentucky high Court has held it to be

⁹³ Appendix 2 contains the Fayette Circuit Court Juror's Personal Data Sheet.

error to restrict voir dire on some of the questions below.⁹⁴ Short of revealing actual or implied bias, these questions call for information which is directly, and in an obvious fashion, used by attorneys in the exercise of peremptories. It is far easier to accept the logic of a challenge to a friend of the adversary than to appreciate the reasoning behind challenges based on what the juror reads or watches on television. As expected, Kentucky judges overwhelmingly endorsed questions seeking the jurors' knowledge of or relationship to the case.

Table 9. Scope of Voir Dire: Jurors' Knowledge of or Relationship to the Case

Place a check mark beside those topics which you feel to be appropriate for voir dire examination. Please check each that applies

- | | |
|------------|--|
| <u>99%</u> | 1) Whether any jurors have personal knowledge of any of the facts of the controversy; |
| <u>91%</u> | 2) Whether any of the jurors have heard of the incident (radio, television, newspaper, friend, etc.); |
| <u>97%</u> | 3) Whether any jurors have formed an opinion about the matter; |
| <u>97%</u> | 4) Relationship by blood or marriage to a party; |
| <u>96%</u> | 5) Acquaintance with a party; |
| <u>93%</u> | 6) Relationship by blood or marriage to a witness (would require each side to identify its witnesses); |

⁹⁴ The Court of Appeals has reversed the trial court where questioning was not permitted on (1) the relationship to a party, victim or key witness: *Horton v. Commonwealth*, 240 S.W.2d 612 (Ky. 1951); (2) acquaintance with party, victim or key witness: *Bourland v. Mitchell*, 335 S.W.2d 567 (Ky. 1960) and *Olympic Realty v. Kamer*, 141 S.W.2d 293 (Ky. 1940); (3) personal knowledge of the facts: *Messer v. Commonwealth*, 181 S.W.2d 438 (Ky. 1944); (4) exposure to pre-trial publicity: *Ferguson v. Commonwealth*, 512 S.W.2d 501 (Ky. 1974); (5) involvement of juror or relative in similar event: *Jackson v. Commonwealth*, 323 S.W.2d 874 (Ky. 1959); *Sizemore v. Commonwealth*, 306 S.W.2d 832 (Ky. 1957), and *Drury v. Franke*, 57 S.W.2d 969 (Ky. 1933); (6) racial prejudice: *Brumfield v. Consolidated Coach Corp.*, 40 S.W.2d 356 (Ky. 1931); (7) feelings about patricide, *Webb v. Commonwealth*, 314 S.W.2d 545 (Ky. 1958).

- | | |
|------------|---|
| <u>79%</u> | 7) Acquaintance with a witness; |
| <u>94%</u> | 8) Employment or acquaintance with the attorneys; |
| <u>81%</u> | 9) Employment or acquaintance with any member of the attorneys' firms (would require reading names of all attorneys in the firm); |
| <u>27%</u> | 10) Employment or acquaintance with other jurors; |
| <u>96%</u> | 11) Personal involvement in an event similar to that on trial; |
| <u>75%</u> | 12) Involvement of a friend or relative in an event similar to that on trial; |
| <u>79%</u> | 13) Whether any jurors have served as jurors in similar trials; and |
| <u>84%</u> | 14) Whether jurors possess specialized knowledge about an anticipated technical issue in the case. |

The judges endorsed all questions except the tenth, dealing with a juror's relationship with other jurors. All the above questions generally can be answered "yes" or "no," and do not require the jurors to evaluate their attitudes on a specific topic. At the same time honest responses are imperative, for these questions bear directly on the juror's fitness for service in a particular case. Questions of this type seem well-suited to the judge's portion of voir dire. The judge does not need to know in advance the details of the case at bar and can thus rely on a standard set of questions applicable to all cases. Furthermore, as a neutral authority figure, the judge can impress on jurors the need for candor.

3. *Jurors' Attitudes Toward the Issues and the Parties*

While questions dealing with the jurors' knowledge of or relationship to the case call for factual responses, attitude questions seek the jurors' feelings toward matters that will arise in the case. Such questions may be characterized fairly as direct probes for actual bias. Table 10 reflects the Kentucky circuit judges' standard practice when attorneys dare to

confront jurors with their biases.

Table 10. Scope of Voir Dire: Attitudes Toward Issues or Parties

<u>44.0%</u>	1)	I permit attorneys to freely question jurors about their attitudes toward characteristics of the parties or the issues.
<u>33.3%</u>	2)	I permit attorneys to probe for bias against the parties or the issues when I believe it is <i>possible</i> bias exists in the community.
<u>21.2%</u>	3)	I permit attorneys to probe for bias only when I believe it is <i>probable</i> that bias exists in the community.
<u>1.5%</u>	4)	I do not permit attorneys to question jurors about their attitudes toward characteristics of the parties or the issues.

This survey indicates that Kentucky trial judges are very liberal in permitting direct probes for bias. Kentucky's high Court has held that there is a right to voir dire on central issues where bias is probable.⁹⁵ Kentucky judges, however, generally do not require a showing of probability; the mere possibility of bias is sufficient. Indeed, forty-four percent of the responding judges said they freely permit questioning directed at the jurors' attitudes toward characteristics of the parties or issues.

Consistent with this finding were the judges' responses to the appropriateness of voir dire on specific attitudes when relevant to the case. The following table reflects willingness to permit voir dire on these matters.

Table 10a.

Do you believe voir dire on the following topics to be appropriate (if relevant)? Check all that you believe to be appropriate.

<u>90.3%</u>	1)	Attitude toward blacks;
<u>96.8%</u>	2)	Attitude toward those who use intoxicants;
<u>96.8%</u>	3)	Attitude toward those who use drugs;

⁹⁵ See note 94 *supra* for cases which support this proposition.

<u>75.8%</u>	4) Attitude toward those who have been convicted;
<u>82.3%</u>	5) Attitude toward homosexuals;
<u>61.3%</u>	6) Attitude toward unemployed persons;
<u>72.6%</u>	7) Attitude toward teenagers;
<u>56.4%</u>	8) Attitude toward working women with children in day care;
<u>69.4%</u>	9) Attitude toward sex outside marriage;
<u>96.8%</u>	10) Attitude toward police;
<u>91.9%</u>	11) Attitude toward corporations; and
<u>87.1%</u>	12) Attitude toward non-residents of the county.

Direct probes for bias, however, are relatively rare in Kentucky. Half of the responding judges said that such questions were asked in fewer than one-fourth of their cases. Consistent with the view that such questions are proper, the judges indicated that they rarely sustained objections to these questions.

The infrequency of attitude questions was unexpected. A trial in which no juror is suspected of harboring unfriendly attitudes toward some aspect of an attorney's case is hard to imagine. Attorneys could be expected to ask attitude questions to establish actual bias, to gain information for the exercise of strikes, or to condition the jury to disregard an unsavory fact which the attorney expects to surface during trial.⁹⁶ Since attitude rarely is covered by the judge in a standard voir dire,⁹⁷ and since judicial acceptance of such questions is high, the failure of attorneys to inquire about how jurors feel is surprising. A logical explanation for this reluctance is the fear that a probe for bias only can accentuate the unfortunate aspects of the case.

⁹⁶ "When you have explosive material in your case such as a client who has been convicted of a felony, who was driving under the influence of alcohol at the time of the accident, or some other dangerous point, it should be brought out as quickly as possible with the very first juror."

A. MORRILL, *supra* note 53, at 9.

⁹⁷ One judge commented "There's no way I can ask them how they feel about something, because I don't know the case that well, and I don't know what the attorney thinks is detrimental to his side."

4. *Jurors' Attitudes Toward the Law*

Attorneys sometimes wish to question jurors about their attitudes toward the applicable law. The ostensible reason is to probe for bias against the law. An example of such a question is: "The use of deadly physical force is justifiable when a person believes such force is necessary to protect himself against death or serious injury. How do you feel about such a law?" Even though bias against the applicable law is a legitimate subject for inquiry, such questions often appear as instruments of indoctrination or as attempts to anticipate the instructions. Since the judge is responsible for giving instructions, the attorney who asks questions about the jurors' attitudes toward the law may appear to be infringing upon the judge's authority. Furthermore, the attorney's statement of the law often will be an interpretation, undoubtedly favorable to his side, and this may strike the judge as an attempt to argue the case.

Whether these questions will be permitted depends largely upon the form of the questions. One judge said he would not allow the self-defense question in the form in which it appears above but would permit a non-argumentative statement of the defense, coupled with: "Can you follow the court's instruction on self-defense?" A negative response to this question would be grounds for challenge for cause.

Kentucky appellate court decisions in this area do not provide much guidance to trial courts. In criminal cases the courts have held that voir dire on jurors' attitudes toward the presumption of innocence,⁹⁸ self-defense,⁹⁹ and the range of punishment¹⁰⁰ are legitimate but that "to instruct on the law peculiar to the case or inquire into the jurors' knowledge of that law" is improper and should not be allowed.¹⁰¹ In civil

⁹⁸ *Gross v. Commonwealth*, 256 S.W.2d 366 (Ky. 1953); cf. *United States v. Blount*, 479 F.2d 650 (6th Cir. 1973).

⁹⁹ *Webb v. Commonwealth*, 314 S.W.2d 543 (Ky. 1958).

¹⁰⁰ *Iles v. Commonwealth*, 455 S.W.2d 533 (Ky. 1970). But see *Mercer v. Commonwealth*, 330 S.W.2d 734, 736 (Ky. 1960) (improper but not prejudicial for the prosecutor to ask the jury members if they could "follow the law as given by the court and impose a life sentence"). The Court said this statement was improper because of its "explicitness." *Id.*

¹⁰¹ *Harrell v. Commonwealth*, 328 S.W.2d 531, 532 (Ky. 1959).

cases the appellate court will defer to the discretion of the trial court,¹⁰² subject to the admonition that "mind-conditioning" or "brainwashing" questions should not be permitted.¹⁰³

Table 11 records the Kentucky trial judges' responses to the use of voir dire in ascertaining the jurors' attitudes toward the law. Even though the judges generally were tolerant of such questioning, many required a strong showing of probable bias in the community, and a few purported to prohibit such questioning.

Table 11. Scope of Voir Dire: Attitudes Toward the Law

<u>48.5%</u>	1)	I permit attorneys to freely question jurors about their attitudes toward the applicable law.
<u>21.2%</u>	2)	I permit attorneys to probe for bias against the applicable law, when I believe it is <i>possible</i> that such bias exists in the community.
<u>16.7%</u>	3)	I permit attorneys to probe for bias against the applicable law only when I believe it is <i>probable</i> that such bias exists in the community.
<u>13.6%</u>	4)	I do not permit attorneys to question jurors about their attitudes toward the applicable law.

Follow-up interviews confirmed the lack of uniformity on this point. Three of the fifteen judges were quite tolerant of this type of questioning, while the others, to varying degrees, controlled this kind of inquiry. Four specifically said they prohibited attorneys' attempts to commit jurors to follow the law. Four others indicated that they listened carefully to insure that attorneys did not misstate or embellish legal principles.

¹⁰² Compare *Temperly v. Sarrington's Adm'r*, 293 S.W.2d 863 (Ky. 1956) (Court of Appeals affirmed the trial court in permitting plaintiff's counsel to ask jurors if they would have any scruples against returning a verdict for the full amount if they felt the law and evidence justified it) with *Farrow v. Cundiff*, 383 S.W.2d 119 (Ky. 1964) (Court upheld the trial court in denying plaintiff's counsel the opportunity to ask the question asked in *Temperly*).

¹⁰³ *Rankin v. Blue Grass Boys Ranch, Inc.*, 469 S.W.2d 767 (Ky. 1971).

The questionnaire also asked judges to indicate whether voir dire was appropriate, if relevant, on six specific legal principles. The affirmative responses were:

Table 11a.

<u>95.5%</u>	1)	Attitude toward the presumption of innocence;
<u>89.4%</u>	2)	Attitude toward the reasonable doubt standard; .
<u>89.4%</u>	3)	Attitude toward the defense of insanity;
<u>79.1%</u>	4)	Attitude toward the right of an accused not to testify;
<u>71.6%</u>	5)	Attitude toward contributory negligence and;
<u>86.6%</u>	6)	Attitude toward the right to money damages for pain and suffering.

These responses show a high level of acceptance toward questioning on these particular legal propositions.

The judges indicated that voir dire on attitudes toward the law was more common in criminal cases than in civil cases. This finding is not surprising. The defense attorney wants to mention reasonable doubt and presumption of innocence as often as possible, and the prosecutor may want to voir dire jurors on their feelings toward the range of penalties for the crime charged.

Sixty-five percent of the responding judges reported that they rarely or never sustained an objection to this type of question, or intervened in the absence of objection from opposing counsel. This response probably demonstrates that attorneys know what judges will tolerate. If the judge has indicated that comments about contributory negligence are improper during voir dire, the attorney will reserve comment until his opening statement.

5. *Hypothetical Questions*

Hypothetical questions ask the jury to assume certain facts and then to answer questions based on these assumptions. The attorney represents that he can prove the assumed

facts. Hypothetical questions often are simply the attorney's argument in question form. He is not seeking responses; rather, he wants to commit the jury to a point of view prior to the introduction of evidence. This type of questioning has been criticized sharply as a perversion of *voir dire*.¹⁰⁴

Kentucky judges were questioned on the extent and desirability of hypothetical questions in their courts. They were given the following explanation.

The question may be general ("Do you believe that a knife could come open suddenly in a struggle?"), or specific ("If Mike Jones were to testify that he had the knife in his hand and it suddenly came open and accidentally cut John Smith, do you believe this is possible?"). Often hypothetical questions ask the jury to apply the anticipated instructions to anticipated evidence. For example, "Suppose the facts show the defendant is ninety percent at fault and the plaintiff only ten percent at fault. Would you hesitate to bring in a verdict for the defendant, as the law requires?"

The judges were then asked to indicate their attitudes toward hypothetical questions. In light of the criticism of such questions, a large number of Kentucky judges surprisingly permit their use.

Table 12. Scope and Form of *Voir Dire*: Hypotheticals.

<u>21.1%</u>	1)	I permit attorneys to freely ask hypothetical questions covering the anticipated instructions and evidence.
<u>17.9%</u>	2)	I permit attorneys to ask <i>general</i> hypotheticals covering the anticipated instructions and the attorneys' theory of the case. I do not permit the attorneys to be specific in stating what the evidence will be.

¹⁰⁴ State v. Manley, 255 A.2d 193, 205 (N.J. 1969).

- 23.4% 3) I permit attorneys to ask general hypotheticals covering their theory of the case. I do not permit attorneys to be specific in stating what the evidence will be nor do I permit the attorneys to ask hypotheticals involving the anticipated instructions.
- 37.3% 4) I do not permit attorneys to ask hypothetical questions.

Although Kentucky's highest court has said that "brain-washing" jurors in voir dire is improper,¹⁰⁵ two-thirds of the Kentucky trial judges said that under some circumstances they would permit hypotheticals. Hypothetical questioning in voir dire, however, is not a common practice in Kentucky courts. Although a few judges estimated that such questions were asked in over three-fourths of their cases, forty-six of sixty-four respondents said that hypotheticals were attempted in less than one-fourth of their cases. The hypothetical question is not designed to select a jury; it is a tool of persuasion employed at a stage of the proceedings when persuasion is improper. A clear standard prohibiting hypotheticals would further the administration of justice.

VI. FINDINGS AND RECOMMENDATIONS

A. *Findings*

The results of the questionnaire and follow-up interviews indicate the following:

1. Most Kentucky judges conduct an initial voir dire and permit supplemental questions from counsel.
2. Kentucky lawyers use the Juror Summons and Qualification Form in exercising their peremptory challenges.
3. Judges generally tolerate questions soliciting background information that does not appear in the juror qualification form.
4. That part of the voir dire which asks jurors about their relationship to the parties or to the case usually is conducted by judges, who permit attorneys to ask supplemental questions which bear on the propriety or desirability of the

¹⁰⁵ Rankin v. Blue Grass Boys Ranch, Inc., 469 S.W.2d at 767.

juror sitting on the case.

5. Judges generally do not ask jurors about their attitudes toward a characteristic of the party or the case; however, they permit attorneys to pursue such questioning.

6. A majority of judges permit attorneys to inquire into the jurors' feelings about the applicable law. A strong minority feels that if such questions are asked, the judge should be the interrogator. Many judges permit attorneys a limited opportunity to make such inquiries but guard closely against misstatements.

7. Judges vary greatly in their attitudes toward hypothetical questions. Some judges are tolerant of attorneys' efforts to persuade through this medium; however, a large number of responding judges do not permit hypothetical questions.

8. In the absence of an objection, judges will intervene whenever a juror is being embarrassed or time is being wasted. A majority of judges, however, will not stop efforts at persuasion if the opponent fails to object.

9. Judges do not agree on the permissibility of individual questioning. Most judges indicated that they either permit attorneys to ask group questions and elicit individual responses, or they prohibit individual questioning except when pursuing an answer already given by a juror.

10. Most judges permit sequestered questioning only when the juror may be embarrassed or when the juror's response may prejudice one of the parties. In those situations, most judges call the juror to the bench on their own initiative.

11. Lengthy voir dire is rare in Kentucky.

B. *Recommendations*

Recognizing that the mechanics and content of voir dire are within the discretion of trial judges, the following recommendations are advanced to encourage uniformity and to protect more adequately the jurors' right of privacy.

1. *Juror Qualification Form*

The present standard juror qualification form asks two types of questions, those that bear on juror qualification and those that seek background data about the jurors. Answers to the latter type of questions enable attorneys to generalize about jurors and the way they will respond to issues in partic-

ular cases. Accordingly attorneys would like the juror qualification form expanded to include other questions generally deemed useful in the exercise of peremptories.

The standard form, however, has no warning informing jurors that the answers they give will be shared with attorneys.¹⁰⁶ The form leaves jurors with the impression that *all* questions must be answered, instead of telling jurors that only those questions bearing on juror qualification must be completed.

A recommendation on the qualification form must balance the jurors' legitimate interest in restricting the disclosure of personal information against the attorneys' need for such information in order to intelligently exercise their peremptory challenges. The author recommends that the form be divided into two parts; part one would consist of questions bearing on juror qualification and part two would consist of questions asking for background information. The juror would be instructed that the first part *must* be completed and that the second part *may* be completed. Jurors would be encouraged to complete the optional part¹⁰⁷ and be informed that their failure to provide the information requested might result in the judge requiring answers to one or more of the questions should the juror be called to sit on a case. The judge would require background questions to be answered during voir dire if directly relevant to issues in the case on trial. If the form is not excessively long or overly personal, jurors will probably complete both sections.

¹⁰⁶ KRS § 29A.070(7) (1977) provides that the judge can order these forms withheld, but the interviews indicated that this is rarely done. In *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979), the Second Circuit Court of Appeals affirmed the trial court's decision to withhold the names of the jurors both prior to and during the trial.

¹⁰⁷ Since completion of part two of the questionnaire is not mandatory, the only limitations are practical ones: whether the questions will yield valuable information; whether jurors will be offended by the questions; and how many questions a juror can be expected to answer. The development of a valid practical juror data sheet is beyond the scope of this article. Included in Appendix 3, however, is a personal data sheet prepared by the Kentucky Office of Public Advocacy with the assistance of a jury selection specialist. This sheet was approved for use in a criminal trial in Jefferson Circuit Court in 1978 but has not been generally approved there.

2. *Division of Questioning Between the Judge and Attorneys*

After explaining the nature of the controversy, the judge should question the jurors about their relationship to the parties and the case. Since these questions solicit factual affirmations or denials and since the judge is a neutral authority figure who can impress upon the jurors the need for honesty and candor, the judge is particularly well suited to ask these questions. Judges can develop or adopt standardized questions covering most of the situations which give rise to implied bias.

The judge is also the appropriate party to ask initial questions about the jurors' attitudes toward the applicable law. If the attorneys desire the jurors to be questioned about their feelings toward legal propositions (reasonable doubt, for example), this should be made known to the judge prior to trial. The judge should then state the applicable law and ask the jurors if they have reservations about applying those legal principles.

While the *judge* should initiate questions on the jurors' attitudes toward the applicable law, questions that relate to the jurors' attitudes toward the issues and the parties should begin with the *attorneys*. By such questions the examiner searches for actual bias. Attorneys know their case better than does the judge and will have made tactical decisions about the desirability of such questioning. Only the attorneys can be expected to know which issues will arise during the case and to decide whether inquiry into the jurors' attitudes is tactically wise. The judge should permit such questioning whenever he feels it possible that community bias exists.

If a juror responds to a question put by the judge in such a way as to raise the possibility that the juror may be the subject of a challenge for cause, the attorneys should be permitted to ask follow-up questions before the judge asks the juror if he can be fair. The judge's initial questioning on any topic should be as factual as possible; the juror should not at this time be asked to evaluate his feelings or the way an event in his life might affect his consideration of the evidence. This recommendation recognizes the preclusive effect of the "will

that affect your verdict?" type question on the ability of counsel to show implied or actual bias which will support a challenge for cause. After questioning by counsel it is appropriate for the judge to ask the juror if he can be fair.

3. *Protecting the Jurors' Right of Privacy*

At the beginning of voir dire, the judge should impress on jurors the need for forthright responses. The judge should also inform jurors that if they desire to speak outside the presence of the other jurors, they should raise their hands whereupon they will be called to the bench. Questions should be phrased so that no embarrassing inferences can be drawn from a juror's raising his hand. For example, the defense attorney who wants to know whether a juror's experiences have made him unduly hostile toward those suspected of using drugs should ask the jury: "Have drugs affected you, a member of your family, a friend or an acquaintance?" Such a question permits the juror whose son is an addict to raise his hand and approach the bench without publicly identifying the nature of the problem.

4. *Individual Questioning*

The conflicting interests of the attorney, who desires as much individual questioning as possible; of the judge, who attempts to prevent indoctrination and excessive time consumption; and of the juror, who wishes not to be embarrassed before his peers, necessitate a balancing approach to this controversial issue. Attorneys initially should question the panel rather than individual jurors. On any issue where bias is possible, however, attorneys should be permitted to proceed either by open ended questions with volunteered responses or by closed questions with required responses. On the issue of the use of drugs, an example of the first type question would be: "How do you feel about those who use drugs"? An example of the second type question would be: "Would your feelings about drugs make it difficult for you to return a verdict for my client?" With the latter form of questioning the attorney

could ask each juror to respond.¹⁰⁸

In addition the judge should, on request, elicit individual responses to questions directed to jurors' attitudes toward the applicable law. Finally neither the judge nor an attorney should single out a juror for a narrative response in front of the other jurors.

5. *Sequestered Questioning*

On extremely important and sensitive matters, such as jurors' views about capital punishment, the judge should permit sequestered questioning of jurors,¹⁰⁹ and ask, or permit to be asked, questions calling for narrative responses.

6. *Hypothetical Questioning*

Because hypothetical questions are used primarily as a means of indoctrinating jurors, their use should be prohibited.

It is hoped all Kentucky circuit judges will consider adoption of these suggestions. Reflecting for the most part the prevailing practice in the state, these recommendations seek uniformity and an appropriate balance between the conflicting interests of judge, juror and attorney in the voir dire process.

¹⁰⁸ Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1525 (1975).

¹⁰⁹ Undoubtedly, sequestered questioning of each juror in each case would provide more information for the exercise of challenges for cause and peremptory challenges. Such a procedure would lengthen trials substantially and would cause some resentment among jurors. Most judges conclude that the disadvantages of such questioning outweigh the benefits. However, when the issues are serious, the judge and jury should be willing to endure some inconvenience. Michael Nietzel, Professor of Psychology at the University of Kentucky and an expert on jury selection, recently undertook a study of 11 Kentucky cases in which the death penalty was sought. In three cases jurors were sequestered; in four cases the judge permitted only group questioning in open court; in the other cases there was some individual or sequestered questioning. Nietzel found that sequestered individual questioning identified seven times as many biased jurors (successful challenges for cause) as did group questioning in open court. M. Nietzel & R. Dillehay, *Effects of Voir Dire Procedure in Capital Murder Trials* (unpublished manuscript under editorial review).

Appendix 1

AOC-77-401

Commonwealth of Kentucky
Court of Justice**JUROR SUMMONS AND
QUALIFICATION FORM**

_____ Court

COMMONWEALTH OF KENTUCKY

GREETINGS: You are hereby notified by the Chief Circuit Judge of _____ County that you have been selected to serve as a trial juror. You are, therefore, summoned to appear at the _____ at the time shown.

Date _____ Time _____

Circuit Clerk

Please complete the qualification form below. You should type or print legibly with dark ballpoint pen. **THIS FORM MUST BE RETURNED TO THE CIRCUIT CLERK'S OFFICE WITHIN TEN DAYS EITHER IN PERSON OR BY MAIL.****CAUTION:** No person shall willfully misrepresent a material fact on a Juror Qualification Form, KRS 29A.070(6).**JURY QUALIFICATION FORM**

LAST NAME		FIRST NAME		MIDDLE INITIAL		BIRTHDATE	
ADDRESS				CITY		STATE	
BIRTHPLACE		MARITAL STATUS		SPOUSE'S NAME		AGES OF CHILDREN	
YOUR OCCUPATION		EMPLOYER'S NAME AND ADDRESS				NO. OF YEARS EMPLOYED	
SPOUSE'S OCCUPATION		SPOUSE'S EMPLOYER'S NAME AND ADDRESS				NO. OF YEARS EMPLOYED	

Have you or any member of your family ever made a claim for personal injury? Yes _____ No _____

Has a claim for personal injury ever been made against you or a member of your family? Yes _____ No _____ If yes, what type? _____

Have you or a member of your family ever been party to a lawsuit? Yes _____ No _____ If yes, what type? _____

Have you or a member of your family ever been a defendant, witness, or complainant in a criminal case? Yes _____ No _____ If yes, what year, county, and state? _____

What level of education have you completed? _____

Are you a citizen of the U.S.? Yes _____ No _____

Are you able to speak or understand the English language? Yes _____ No _____

Are you incapable, by reason of physical or mental disability, of rendering effective jury service? (A doctor's note is required and it must be returned with these completed forms to establish disqualification). Yes _____ No _____

Have you been previously convicted of a felony and not been pardoned by the Governor or other authorized person of the jurisdiction in which you were convicted? Yes _____ No _____

Are you presently under indictment? Yes _____ No _____

Have you served as a juror in a Kentucky State Court within the past twelve months? Yes _____ No _____ If yes, Court where you were a juror _____

I am a resident of _____ County.

If you think you have a valid excuse for not serving as a juror, explain your reason below: _____

NOTE: ALL JURORS THAT ARE DISQUALIFIED OR EXCUSED WILL BE NOTIFIED BY PHONE OR MAIL. PLEASE PROVIDE THE FOLLOWING PHONE NUMBERS.

HOME PHONE _____ BUSINESS PHONE _____ SPOUSE'S BUSINESS PHONE _____ EMERGENCY PHONE _____

I certify that the information given above is correct and complete to the best of my knowledge.

Signature _____ Date _____

(See Reverse Side)

Appendix 1 continued

PLEASE READ THIS CAREFULLY!

Below you will find general information that will be useful to you. In addition, there is a Juror Qualification Form on the other side of this page that must be filled out by you. Detach and mail the Juror Qualification Form to the Circuit Clerk's Office within ten days. Return the completed form to:

FAILURE TO COMPLY WITH THIS SUMMONS IS PUNISHABLE AS CONTEMPT OF COURT, KRS 29A.150.

GENERAL INFORMATION

JURY TERM: Jury services is usually for a thirty-day period beginning on the day shown on the summons.

JURY FEE: Jurors receive \$12.50 a day for their services (\$5.00 pay and \$7.50 expenses).

TELEPHONE: To report an absence or receive an emergency call while serving as a juror, you may call _____

NOTE TO EMPLOYERS: KRS 29A.160(1) states that an employer shall not deprive an employee of his employment or threaten or otherwise coerce him with respect thereto, because the employee receives a summons, responds thereto, serves as a juror, or attends court for prospective jury service. Any employer who violates this law is guilty of a Class B misdemeanor (KRS 29A.990(1)). A work excuse will be provided for those persons requesting one.

For Office Use Only:**PANEL NUMBER****STRICKEN BY WHOM****BOX NUMBER OF JUROR****JUROR BADGE NUMBER**

Appendix 2
FAYETTE CIRCUIT COURT
JUROR'S PERSONAL DATA SHEET

Name _____ Age _____ Are You a Citizen of US? Yes No
 Address _____ Telephone Number _____
Zip Home Business Ext.
Yes No

Years of Residence in Ky _____ In Fayette Co. _____ Do you speak and understand English _____

Occupation _____ Employer _____
 (If Retired) Last Occupation _____ Employer _____

Education Completed: Grade School _____ High School _____ College _____ Graduate School _____

Marital Status: Married _____ Single _____ Separated _____ Divorced _____ Widow(er) _____

Spouse's First Name: _____ Occupation: _____ Employer: _____
 (If a widow(er) Spouse's Last Occupation _____ Employer _____

List all members of your immediate family by relationship (other than spouse)

Relationship	Age	Occupation	Employer
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Have you, or any member of your family been the victim of a crime? _____
 If so, please describe _____

Have you ever been accused of a crime, with the exception of a traffic offense? _____

Have you ever been convicted of a felony? Yes _____ No _____ Are you now under indictment?
 If Yes, Have you been pardoned? Yes _____ No _____ Yes _____ No _____

Are you related to, or a close friend of any law enforcement officer? Yes _____ No _____

Have you ever served as a Juror in Circuit Court before? Yes _____ No _____

If you did, when and where? _____

Has a claim of \$500 or more ever been asserted by or against you or a member of your immediate family? If so, give the date and nature of each claim (automobile accident, breach of contract, will, etc.) also state whether claim involved you or member of family? _____

Do you have any physical or mental condition which makes it impossible for you to serve?
 Yes _____ No _____ If Yes, please explain _____

I DO HEREBY CERTIFY THAT THE FOREGOING
 ANSWERS ARE TRUE TO THE BEST OF MY
 KNOWLEDGE AND ABILITY AND ACKNOWLEDGE THAT
 A WILLFUL MISREPRESENTATION OF THESE
 ANSWERS MAY BE PUNISHABLE BY A FINE OR
 IMPRISONMENT, OR BOTH.

SIGNATURE OF PERSON SUMMONED FOR JURY DUTY _____

SIGNATURE OF PERSON WHO COMPLETED FORM AND
 REASONS FOR DOING SO (IF OTHER THAN PERSON
 SUMMONED) _____

ADDRESS OF PERSON COMPLETING FORM
 (IF OTHER THAN PERSON SUMMONED) _____

For Court Use Only: Juror Disqualified _____

RETURN THIS FORM PRIOR TO _____

THE EVENING OR MORNING PRIOR
 TO REPORTING CALL 233-1640 TO
 DETERMINE WHETHER YOU
 SHOULD OR SHOULD NOT REPORT
 AS DIRECTED.

Appendix 3

JUROR ID NO. _____

JEFFERSON CIRCUIT COURT
JUROR'S PERSONAL DATA SHEET

1. Name: _____
2. Home Address: _____
3. Have you lived at any other address in the last 5 years? _____
If so, what address? _____
4. Years of residence in Kentucky _____; in Jefferson County _____
5. Occupation: _____
Employer: _____
6. For whom else have you worked in the last 5 years? _____

7. Spouse's Name: _____
Occupation: _____
Employer: _____
8. For whom else has your spouse worked in the last 5 years? _____

9. List all members of your immediate family:

Name	Relationship	Age	Occupation	Employer
10. Have you or any member of your family been a victim of a crime? _____
If yes, explain: _____

12. Are you, or any member of your family, related to or a close friend of any law enforcement officer? _____
13. Have you ever appeared as a witness in circuit court? _____
Was this a civil ____ or criminal ____ case? Did you appear on behalf of the plaintiff (or state) ____ or the defendant _____?
14. Have you ever served as a juror before? _____
Was this a civil or criminal case? _____
What was the result of that case? _____
15. Do you (1) Own a house? ____ (2) Rent? ____ (3) Live with someone else? ____
(4) Other _____
16. Are the people in your neighborhood all white? ____
All black? ____ both black and white? ____
17. How much education have you completed:

Grade School	____	High School	____
College	____	Graduate work	____
19. How do you keep up with the news? Radio ____ TV ____ Newspaper ____
Magazines ____ Friends ____
20. Do you read newspapers? Regularly ____ Somewhat ____ A little ____ None ____
21. Which TV newsprograms do you watch more? Local News ____ National News ____
Both about the same ____ None ____
22. Indicate whether you have any problem with hearing ____ eyesight ____ or any other medical condition _____
23. Please list any organizations or associations to which you belong, such as PTA, social clubs, national organizations: _____

23. Please list any such organizations or associations to which your spouse belongs: _____